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No. 34058

IN THE

Supreme Court of Illinois

SEPTEMBER TERM, 1956.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JAMES DAVIS, Plaintiff in Error.	Error to Circuit Court of Winnebago County. Honorable Albert S. O'Sullivan, Judge Presiding.

ABSTRACT OF RECORD.

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INDEX.

	PAGE
Affidavit for Change of Venue	14
Arguments	67
Arraignment	5
Assignment of Errors	97
Capias	4
Certificates:	
of Judge	96
of Clerk	96
Grand Jury	1
Indictment	2
Instructions:	
for Plaintiff	72
for Defendant	74
Judgment and Sentence	9
Motions:	
to Quash Indictment	5
for Complete List of Witnesses	5
to File Affidavit for Change of Venue	14
to Compel Election between Counts	6
for Directed Verdict	43, 66
for New Trial	9, 91
in Arrest of Judgment	9, 96
to Stay Mittimus	11

Notice of Additional Witnesses 5

Orders:

Denying Motion to Quash Indictment 5

Granting Motion for Complete List of Witnesses 5

Denying Petition for Change of Venue 5, 13

Denying Motion to File Affidavit for Change of Venue 14

Reserving Motion to Compel Election between Counts 14, 43

Denying Motion for Directed Verdict 43, 66

Denying Motion for New Trial 9, 95

Denying Motion in Arrest of Judgment 9, 96

Staying Mittimus 11

Petition for Change of Venue 5

Plàcita 1

Plea of Not Guilty 5

Praecipe for Record 96

Recognizance 5

Report of Proceedings 12

Verdict 8

WITNESSES

For Plaintiff:

Ferona, Joe

Direct Examination (Out of presence of jury) 28
Cross Examination (Out of presence of jury) 30
Direct Examination 34
Cross Examination 35

Iasparro, Mike

Direct Examination (Out of presence of jury) 31
Cross Examination (Out of presence of jury) 31
Direct Examination 30
Cross Examination 40
Direct Examination (recalled) 39

Roberts, E. G.

Direct Examination 34
Cross Examination 35

Templeman, Anna Nadine

Direct Examination 21
Cross Examination 23

Templeman, Darla

Direct Examination 24
Cross Examination 26

Templeman, Hazel

Direct Examination 15
Cross Examination 19
Redirect Examination 19
Recross Examination 20

For Defendant:

Davis, Anna K.

Direct Examination 44
Cross Examination 46
Redirect Examination 46
Redirect Examination 62
Recross Examination 62

Davis, Imogene

Direct Examination 47
Cross Examination 48
Redirect Examination 49
Recross Examination 49
Direct Examination 49
Cross Examination 50

Davis, James

Direct Examination (Out of presence of jury) 31
Cross Examination (Out of presence of jury) 33
Direct Examination 53
Cross Examination 60
Redirect Examination 61

Davis, John

Direct Examination 51
Cross Examination 52

Dorris, Elwyn

Direct Examination 50

For Plaintiff in Rebuttal:

Ferona, Joe

Direct Examination 65

Iasparro, Mike

Direct Examination 65

Cross Examination 65

Politt, Erwin Leroy

Direct Examination 62

Cross Examination 63

Redirect Examination 64

Recross Examination 64

For Defendant in Surrebuttal:

Davis, James

Direct Examination 66

EXHIBITS

For Plaintiff:

1. Statement of James Davis 38

IN THE

SUPREME COURT OF ILLINOIS

SEPTEMBER TERM, 1956.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JAMES DAVIS, Plaintiff in Error.	Error to Circuit Court of Winnebago County. Honorable Albert S. O'Sullivan, Judge Presiding.

ABSTRACT OF RECORD.

Rec. Page

1 Placita, January Term, 1956.

Court convened January 9, 1956. The grand jury is impaneled and instructed by the court.

2 Marvin Myers, an officer, is designated to take charge of the grand jury who retire to deliberate upon such business as may come before them.

3-6 Among the true bills of indictment was a certain indictment, as follows:

State of Illinois
Winnebago County—ss.

Of the January Term of the Winnebago County Circuit Court, in the year of our Lord, one thousand nine hundred and fifty-six.

1. The Grand Jurors chosen, selected and sworn, in and for the County of Winnebago in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That James Davis late of the County of Winnebago and State aforesaid, on the 18th day of September in the year of our Lord one thousand nine hundred and fifty-five at and within the said County of Winnebago in the State of Illinois aforesaid, being then and there a male person of the age of fourteen (14) years and upwards, in and upon one Anna Nadine Templeman, then and there being a female person, unlawfully, feloniously, forcibly and against the will of the said Anna Nadine Templeman did make an assault and her, the said Anna Nadine Templeman, then and there unlawfully, feloniously and forcibly and against the will of the said Anna Nadine Templeman did ravish and carnally know, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

2. And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Winnebago aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that the

said James Davis late of the County and State aforesaid, on the 18th day of September in the year of our Lord one thousand nine hundred and fifty-five at and within the said County of Winnebago in the State of Illinois aforesaid, being then and there a male person of the age of seventeen years and upwards, did then and there unlawfully and feloniously have carnal knowledge of one Anna Nadine Templeman, she, the said Anna Nadine Templeman, then and there being a female person under the age of sixteen years and not then and there the wife of him the said James Davis, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

3. And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Winnebago aforesaid, in the name and by the authority of the People of the State of Ilinois aforesaid, upon their oaths aforesaid, do further present that the said James Davis late of the County and State aforesaid, on the 18th day of September in the year of our Lord one thousand nine hundred and fifty-five at and and within the said County of Winnebago in the State of Illinois aforesaid, in and upon one Anna Nadine Templeman, a female person then and there unlawfully, forcibly and feloniously did make an assault, with an intent then and there the said Anna Nadine Templeman, unlawfully, feloniously, forcibly and against her will to carnally know and ravish, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the same People of the State of Illinois.

Robert R. Canfield,
State's Attorney in and
for Winnebago County

(Indorsements on Back of Indictment.)

No. 9116

In The Circuit Court
of Winnebago County
To the January Term, A.D. 1956

The People of the State of Illinois

vs.

James Davis

Indictment
For Rape, Statutory Rape, Assault
with intent to commit Rape

A True Bill
Stanley Kjellgren
Foreman of the Grand Jury

Witnesses
Anna Nadine Templeman
Hazel E. Templeman
Mike Iasparro
Joe Ferona

Capias 1-9-56

Bail Required $3,500.00

William R. Dusher
Judge of said Court

Filed this 9th day of January
A.D. 1956

Paul N. Wilson
Clerk of said Court

7 Order entered that Clerk file and docket 11 true bills of indictment and writs of capias issue.

8-9 Criminal Capias.

10 Grand jury discharged for term unless recalled by order of court.

11 Order entered January 11, 1956, as follows:

This day come the said People, by Robert R. Canfield, States Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, also comes. And being arraigned in open court said defendant is furnished with a copy of the indictment, and lists of the witnesses and jurors. The defendant enters his motion to quash the indictment. And having heard the arguments of counsel thereon, and being fully advised in the premises on due consideration the court denies said motion.

The defendant says for his plea that he is not guilty as charged in the indictment. The court sets the case for trial February 13, 1956.

The defendant enters his motion for a complete list of witnesses. And being advised in the premises, on due consideration the court grants said motion, same to be furnished within five (5) days.

The defendant, James Davis, enters into recognizance in open court, returnable February 13, 1956, in the penal sum of $3500, with Imogene Davis, Anna Davis and John Davis as sureties.

12 Notice of Additional Witnesses, filed January 14, 1956.

13 Notice of Additional Witnesses, filed February 7, 1956.

14-15 Petition for Change of Venue, filed February 14, 1956.

16 Motion to Compel Election between Counts, filed February 15, 1956.

17 Order entered February 5, 1956, as follows:

This day come the said People, by Robert R. Canfield, State's Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, also comes.

This cause comes on for hearing on the motion heretofore filed by defendant for change of venue. And after having heard the arguments of counsel and being fully advised in the premises, on due consideration the court denies said motion.

This case being called for trial, it is ordered by the court that a jury be called herein. And the empanelling of the jury begins.

And now the hour of adjournment having arrived, the court instructs the jurors now in the box to have no conversation with anyone or with each other concerning this case and to meet the court at 9:30 o'clock A.M. tomorrow morning. It is thereupon ordered by the court that the balance of the jurors be and they are excused until 9:30 o'clock tomorrow morning.

18 Order entered February 16, 1956, as follows:

This day come the said People, by Robert R. Canfield, State's Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, and the jurors heretofore called into the box also come.

And the empanelling of the jury continues.

And thereupon comes a jury of twelve (12) good and lawful persons, to-wit:

1. Floyd A. Williams
2. Emma S. Koper
3. Ronald W. Guetschow
4. Ruth M. Compton
5. Hershel W. Morlan
6. Dean R. McMaster
7. Hessie E. Hanson
8. James Bruce Bonzi
9. Lillian V. Hinkle
10. Ernest Vowles
11. Ethma E. Ertmer
12. Romaine A. Walters

who are each duly empanelled and sworn to well and truly try this cause and a true verdict render according to the law and the evidence.

And the trial proceeds.

And now the hour of adjournment having arrived, the court instructs the jury to have no conversation with anyone or with each other concerning this case and to meet the court at 9:30 o'clock A.M. tomorrow morning.

19 Order entered February 17, 1956, as follows:

This day come the said People, by Robert R. Canfield, State's Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, and the jury heretofore empanelled and sworn herein also comes.

And the trial proceeds.

And now the hour of adjournment having arrived, the court instructs the jury to have no conversation with anyone or with each other concerning this case and to meet the court at 9:30 o'clock A.M. tomorrow morning.

20 Order entered February 20, 1956, as follows:

This day come the said People, by Robert R. Canfield, State's Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, and the jury heretofore empanelled and sworn herein also comes.

And the trial proceeds.

And now after having heard the opening statements of counsel, the testimony of witnesses sworn and examined in open court, the arguments of counsel, and the instructions of the court, the jury retires to consider of its verdict in charge of Gerald Pratt, duly qualified officer of this court specially sworn for that purpose.

And afterwards, to-wit, on the same day, the jury returns into open court and presents its verdict in words and figures following, to-wit:

The People of the State of Illinois

vs.

James Davis

No. 9116

We, the jury, find the defendant guilty of rape in manner and form as charged in the first and second counts of the indictment, and we fix his punishment at imprisonment in the penitentiary for a term of 15 years.

We further find from the evidence that the defendant is now about the age of 28 years.

Ronald W. Guetschow
Dean R. McMaster
Ernest Vowles
Floyd A. Williams
Ethma E. Ertmer
Lillian Hinkle
Hessie Hansen
Ruth Compton
Romaine A. Walters
Hershel W. Morlan
Emma Koper
James Bruce Bonzi
Foreman

It is thereupon ordered by the court that the jury herein be and the same is hereby discharged from the further consideration of this case.

The defendant enters his motion in arrest of judgment and enters his motion for a new trial.

Thereupon said defendant is remanded to the custody of the Sheriff, and the bond heretofore entered into herein is released and the sureties thereon discharged.

21-24 Motion for New Trial filed March 1, 1956.

25-26 Motion in Arrest of Judgment, filed March 15, 1956.

27 Orders entered March 15, 1956, as follows:

This day come the said People, by Robert R. Canfield, State's Attorney, and the defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, also comes.

This cause comes on for hearing on motion in arrest of judgment. And after having heard the arguments of counsel thereon and being fully advised in the premises, on due consideration the court denies said motion. This cause comes on for hearing on the motion for new trial. And after having heard the arguments of counsel thereon and being fully advised in the premises, on due consideration the court denies said motion.

It is thereupon considered and adjudged by the court that the defendant, James Davis, is guilty of Rape and Statutory Rape as charged in counts one and two of the indictment herein, and in accordance with the verdict of the jury herein.

This day come the said People, by Robert R. Canfield, State's Attorney, and the said defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, also comes, and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty, heretofore rendered to the first and second counts of the indictment in this cause.

Therefore, it is ordered and adjudged by the court that the said defendant, James Davis, who is found to be twenty-eight (28) years of age, and is convicted of the crime of Rape and Statutory Rape herein, be sentenced to the Illinois State Penitentiary, and it is further ordered and adjudged that the said defendant, James Davis, be taken from the bar of this court to the common jail of Winnebago County and from thence by the Sheriff of Winnebago County within fifteen (15) days to the Illinois State Penitentiary, and be delivered to the warden or keeper of said penitentiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, James Davis, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by due course of law, to-wit; for the term of fifteen (15) years, subject to the Parole and Pardon Board of the Department of Public Safety.

(Mittimus stayed for a period of thirty (30) days. Sheriff to have fifteen days thereafter to execute sentence.)

It is further ordered that the said defendant pay all the costs of these proceedings and that execution issue therefor.

28 This day come the said People, by Robert R. Canfield, State's Attorney, and the said defendant, James Davis, as well in his own proper person as by his counsel, John R. Snively, also comes.

The defendant enters his motion to stay the mittimus herein. And being fully advised in the premises, it is ordered by the court that the mittimus herein be and same is hereby stayed for a period of thirty days, the Sheriff to have fifteen (15) days hereafter to execute sentence.

Thereupon said defendant is remanded to the custody of the Sheriff.

28A Order entered April 12, 1956, as follows:

This day on motion of defendant, James Davis, by his attorney, it is ordered by the court that mittimus herein be and same is hereby stayed for an additional fifteen (15) days, and Sheriff to have fifteen (15) days thereafter to execute sentence.

29-495 REPORT OF PROCEEDINGS

Filed April 27, 1956.

Index.

30 This cause came on for trial before Honorable Albert S. O'Sullivan, Judge, and a jury, on February 15, 1956.

Appearances:

Mr. Robert R. Canfield, State's Attorney, and Mr. Rosario A. Gaziano, Assistant State's Attorney, for Plaintiff.

Mr. John R. Snively, for Defendant.

31 And thereupon the defendant presented to the court a Petition for change of Venue, filed February 14, 1956, as follows:

Your petitioner, James Davis, the above named defendant alleges:

1. That he fears that he will not receive a fair and impartial trial in this court if the above entitled cause is tried before the Honorable Albert S. O'Sullivan, or the Honorable William R. Dusher, two of the Judges of said court, because said Judges are prejudiced against him, so that he cannot expect a fair trial by said Judges.

2. That such cause for a change of venue arose and came to his knowledge heretofore and again on February 13, 1956.

Wherefore, your petitioner prays that a change of venue be granted in said cause, pursuant to the statute in such case made and provided.

James Davis

Petitioner.

State of Illinois,
County of Winnebago—ss.

James Davis, being first duly sworn, on oath, deposes and says that he has heard the foregoing Petition for Change of Venue by him subscribed and knows the contents thereof, and that the facts alleged therein are true.

James Davis

Subscribed and sworn to before me
this 14th day of February, 1956.

Lucille Barton
Notary Public.
(Seal)

33 Mr. Snively: We filed our petition yesterday but we were not able to have it considered. Judge Dusher set it for 9:30 this morning. We were to appear before you. We are asking the court to grant our petition.

39 We gave the State's Attorney notice yesterday before we filed the petition.

40 The Court: If I had any knowledge or knew of any thing, I can say I know nothing about the case. I know nothing about the parties, or the charge.

Mr. Snively: Your Honor heard a case against this boy before.

The Court: What case was that?

Mr. Snively: The case of the People *v.* James Davis. The jury disagreed and were discharged. That was four years ago.

41 He learned on February 13, 1956, that the case was assigned to the present judge.

The Court: The motion does not come in proper time. I am going to deny the motion for a change of venue.

42 The case is set for 1:30, be ready at that time.

Mr. Snively: Prior to the selection of the jury and the commencement of the trial, the defendant asks leave to file an affidavit, as follows:

James Davis, being first duly sworn, on oath deposes and says:

1. That he is the defendant and the applicant for a change of venue in the above entitled cause.

2. That he believes that the Honorable Albert S. O'Sullivan and the Honorable William R. Dusher, two of the judges of this court are so prejudiced against him that he cannot have a fair and impartial trial by said judges.

James Davis

Subscribed and sworn to before me
this 15th day of February, 1956.

Lucille Barton

Notary Public.

(Seal)

The Court: Let the record show that the case was set for trial on February 13, 1956.

The motion to file the affidavit is overruled.

Mr. Snively: Let the record show that the motion to compel an election between counts was filed on February 15.

The Court: The ruling is reserved.

(Recess 12:00—1:30)

And thereupon a panel of 12 veniremen were called to the jury box and duly sworn for examination upon their voir dire.

The trial was adjourned to February 16, 1956, at 9:30 o'clock a.m.

Court convened February 16, 1956, pursuant to adjournment.

And thereupon the panel of 12 jurors was duly sworn to try the issues herein.

Mr. Gaziano: At this time I would like to make a motion to exclude all witnesses.

The Court: All witnesses who are to testify in this case will leave the court room.

The plaintiff, to maintain the issues on their part, introduced the following evidence:

HAZEL TEMPLEMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gaziano.

I live at 2811 Fairview Avenue, Rockford, Illinois. I am 43. My husband's name is Cletice. I have 11 children.

We were living there on September 18, 1955. The house is on the back of the lot. There are 6 rooms.

The whole family was in the house. I have a daughter, Anna Nadine Templeman. She was 14 then.

She was born on October 12, 1940, at Stambaugh, Michigan.

I have a daughter, Darla Ann Templeman. She was 9.

She was born on December 30, 1945.

I have a son, Billy Templeman. He was 6.

I was in bed. Darla came bounding into the room. She jumped for the light. After I talked to her, I run to the kitchen and turned on the light. Well, this man hollered and told me to get back in my room. I went back.

I didn't see this party. I wasn't up close enough. I could see his height, but his face I couldn't see. He seemed quite tall. I would say within the neighborhood of 6 feet. I couldn't say the exact height.

It was pretty early, 2:30, 3:00 o'clock, somewhere in there.

53 I was standing in the kitchen in my night gown. No one else was with me.

Anna Nadine was in the bedroom. Her bed was located to the left of the room. Billy was in the same bed with her.

I have another bed. Darla Ann and Donna Lee were in it. Donna Lee was 7.

You come in the kitchen door and walk in a straight line to the bedroom. The entrance to the kitchen is on the west side in the rear of the house.

55 The front door is on the east side.

When I first saw the man, he was by Nadine's bed, right alongside of it. Nadine was in bed.

When he hollered, I stopped.

56 I didn't see him doing anything except standing there because there was no light in the room. I didn't go into Anna Nadine's room.

57 I heard him running out the door. The door had been shut.

58 My husband was working days. He was in the same bedroom I was.

I had occasion to see James Davis on October 14, 1955, at 2811 Fairview Avenue.

59 Joe Ferona and Mike Iasparro brought him over. I, Nadine and Darla, most of my children, were there. I just don't remember all of them.

60 There was a conversation between the officers and him. I was present. They asked him if he had ever

been there before. He said, "I can't remember if I was or not." They questioned him some more. That is about all I could say.

62 They did not take the girls in the room directly where the defendant was. He was in the bedroom that Nadine was in the night this all happened.

64 Iasparro and Ferona were in that room. I heard what was said in the presence of James Davis.

65 Nadine was in the room he was in. Mike had put us so that we could see and hear everything that was said.

66 They were asking him questions about being over to our place. I can't remember the exact words.

68 There was something else said by him but I can't remember.

I saw Anna Nadine Templeman on September 18, 1955.

Q. What did Anna Nadine Templeman tell you on that date?

Mr. Snively: Oh, object to that.

69 Witness: I went into the bedroom where my husband was. I tried to wake him up. He is hard of hearing. I run to the telephone and called the Sheriff. I talked to Anna Nadine. She was hysterical.

70 Q. Describe her physical condition, please.

A. Nadine was absolutely hysterical and she told me, "Mother, he threatened—"

Mr. Snively: I object.

The Court: Go ahead and answer the question.

A. She said, "Mother, he threatened to kill me." She said—she also said he also threatened to kill Billy. He said he would cut his guts out if she didn't

lay down and shut up. He said if she didn't do what he wanted to do, he would kill her. She said he took her pajamas off her and made her lay on the bed.

Q. What else did she say?

A. There wasn't much I could get out of her; she was hysterical.

Mr. Snively: I object to what she couldn't get out of her.

The Witness: She told me she had been attacked.

Mr. Snively: I object to the conclusion of the witness.

The Court: State what she said happened.

A. She put it in her own words, she said, "Mother,
71 he did it to me."

Q. And how was she dressed at the time you saw her?

A. She had her pajamas on.

Q. And what else, if anything, was said by Nadine?

A. When?

Q. At the time you testified to.

A. Well, I can't remember much more was said. After I had my conversation with Nadine, the sheriffs came.

I took her to St. Anthony Hospital.

72 Dr. E. G. Roberts examined her.

73 He examined her private parts. He told me he wanted to show me what happened, the hymen was broken.

74 It looked like a large bruise inside her. He gave her shots and he gave me some medicine to use in her.

75 *Cross Examination by Mr. Snively.*

I have never seen you before. You have never talked to me about the case.

I talked to Ferona and Iasparro September 18, 1955, and January 9, 1956. They have talked with me since I have been here today.

Mr. Gaziano talked to me out in the hall while the court was in recess. As he came back into the court
77 room, he said, "That is what I am trying to get you to say."

He was a tall person. I can't tell how he was dressed. There was no light in there. I had no way of knowing. I couldn't see his face. I wouldn't really know how old he was. I thought he was around 6 feet. I have no opinion how tall you are. He was as tall as you are.

78 They asked him if he had been to our house before. He said he couldn't remember if he was or not. He was in the bedroom that Nadine had been in the night this happened.

79 As far as I can remember Ferona came in the house to tell us he was bringing him in. Ferona and Iasparro were there I would say 15, 20 minutes. It was in the afternoon. It was a little late. It was still daylight.

October 14, 1955, is the only time I have seen James Davis at my home that I could identify him.

80 *Redirect Examination by Mr. Gaziano.*

I didn't know James Davis before. We lived alongside of his folks for about a month.

Recross Examination by Mr. Snively.

There is a window between the two rooms in the house. It was 3 x 4.

I didn't see this person leave the house. The window was a little bit open, but not enough so that anybody could come through.

The deputy sheriffs examined the window and the door on September 18, 1955.

(Recess 12:00—1:30)

HAZEL TEMPLEMAN, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

Recross Examination by Mr. Snively.

I talked to her in the front room. I had telephoned the sheriff.

As soon as I got through I talked to Nadine.

I don't remember what the first thing was I said to her. I couldn't say much to her right away.

I asked her questions. I don't remember the first question.

This person I had seen there had left the house sometime before that.

I just don't remember if I asked her some questions or not. I was quite excited.

She came from the bedroom.

I asked her more than one question.

Mr Snively: I would like to exclude all the testimony of this witness relative to the conversation that she has with her daughter after an alleged incident on September 18, 1955.

The Court: Motion overruled.

88 ANNA NADINE TEMPLEMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am 15. I live with my parents.

89 On September 17, 1955, I was sleeping in the house?

90 I went to bed about 10:00 o'clock. There were two beds. Billy was in bed with me. Donna and Darla were in the same room.

91 The lights were out when I went to bed. The next I remember I was standing in the kitchen.

92 I don't remember getting out of bed and walking to the kitchen.

Well, I see a hand reaching through the window. All of a sudden I heard him ask me to go out. I wouldn't, then he told me to get in the bedroom. I didn't see him. It was dark in the house. It was about 3:00 or 4:00 o'clock in the morning.

93 I didn't see the man at the time I went into the kitchen.

I went in and got in bed. Then he pulled off my pajamas, the bottoms.

94 Billy started talking. He told him to lay down or he would kill him. There wasn't any lights at that time or before that.

He put his private into me, his penis into my vagina or private parts. He was lying on top of me. I would say he kept his penis in 5 minutes. I tried to

95 fight. He had something in his hand and threatened to kill us both.

I know he had something in his hand. I don't know what it was. I don't know what shape it was. He had it in his left hand.

96 Darla snuck out the window. She got into mother's bedroom. I didn't see this.

97 I see a light go on. He told mother to get back in the bedroom or it would be too bad for her. She went back. He took off out the back door.

I didn't see the man after she turned the lights on in my mother's room.

98 The cops came. They asked what happened and mother explained it. I didn't speak to them.

99 I grabbed the flashlight. I flashed it around. I guess that is when Darla got up and ran to the kitchen.

I didn't talk to him at that time. I told him I didn't have the car keys. He was there about 10, 15 minutes.

After that I saw the defendant. Joe and Mike brought him home. I think it was in October.

100 They took him in the same bedroom where it had happened. They asked him if he remembered being there. He said, I don't know, I don't remember. I said it sounded like the voice.

101 He was in the bedroom but not in the same room where I was. Then Joe and Mike brought me into the doorway where I could hear him more plain. I said it was still the same voice. It sounded like his voice.

102 They took him out. I didn't see him after that. It was the same voice when James Davis was there as the voice I heard September 18.

103 The height and profile were similar. He looked fairly tall.

Cross Examination by Mr. Snively.

104 My sister Beverly and I went to bed about the same time. There is a window in the bedroom. It was by the bed. It was on the side my brother was. He was to the right as I lay there in bed.

105 My feet were toward the west. I saw the hand in the window in the kitchen, after I went to bed.

106 There was no glass in the window. There were no lights in the house. I didn't do anything when I saw the hand in the window.

107 I got up out of my bed after my sister called me. I went to the kitchen. No one went with me.

108 The hand unlatched the kitchen door. I wasn't far away from the door. I didn't say anything to the person who unlatched the door.

The Court: Why don't you have her state what happened, there is no need to take all this time; ask her what happened, then if there is any question about it later, you can ask her about it.

109 Well, he came in and tried to get me to go out, I wouldn't, so he made me go in the bedroom. He told me to get in the bedroom or I would get it. I walked back.

110 I got back in bed. My brother was awake. There was no light. My sisters were in bed. I don't know who it was in the bedroom. I couldn't see who the person was.

111 I told the deputy sheriffs that I didn't know who it was in my bedroom. I didn't find any car keys but I looked for them.

I didn't see this person leave the house. I don't know where he went.

112 I didn't hear anything after this person left.

The deputies brought James Davis in the bedroom on October 14, 1955. They were both in there at the same time.

113 I talked to Mike. Mr. Davis should have heard me.

114 He wasn't far away. It was 6 to 8 feet. Well, I just got in the doorway, it's the same thing as in the room.

115 I didn't see this person in the light, just the shadow. The way Jim Davis was standing in the bedroom, just the shape, he made me think it was him, his height and stuff.

I was still in bed when I saw this person standing there. I saw his profile and height.

117 DARLA TEMPLEMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am 10.

118 Mr. Snively: Your Honor, I object to any further testimony of this witness unless sufficient foundation is laid for her to testify.

The Court: Do you know what it is to tell the truth?

The Witness: Yes.

The Court: Do you know what will happen to you if you tell a lie?

The Witness: (No response.)

The Court: Do you know?

The Witness: No.

The Court: Do you go to Sunday School?

The Witness: Yes.

The Court: You do?

The Witness: Yes.

The Court: What will happen to you if you tell something that is not the truth, is it good or bad?

The Witness: Bad.

119 The Court: Go ahead and question the witness.

I and Nadine slept in the same room. Billy slept with Nadine.

I remember the night of September 17. I was sleeping with Donna.

120 A man broke into our house. I heard him say to my sister—I don't know if he had a knife or what he had—he said to my sister—I forgot what he said.

He said he will cut our guts out. My brother got up and he said something.

121 This man said, "You had better lay down or I will cut your guts out." So my brother lay down.

Nadine was laying in the bed. The man was sitting beside her.

Well, I was laying on the bed. I went to get mother. She came in the kitchen.

I saw the man. There was a flashlight. My sister held it in his face, that is when I saw him.

I haven't seen this man since that time.

I saw the same man. Joe and Mike brought him to our house. James Davis is the same man. I recog-
122 nize him now. He is the man the flashlight shown on that night.

I didn't hear the voice of the man that was there that night. I just saw him.

Cross Examination by Mr. Snively.

Nobody has been talking to me about this. Neither my mother nor Nadine have talked to me. I have talked with the deputies, I think, about once or twice.

There was something that awakened me when I was sleeping there. I heard him say, "I will cut your guts out." That is when I woke up. I didn't just lay there in bed. I got up and ran to my mother.

This person was still there when I left. He was sitting on the bed.

He had the flashlight and he give it to my sister. I seen him give it to her when he was outside by the window.

He was out by the window once and then he came in the back door of the house. The window where I saw him hand my sister a flashlight is right by the bed. I was awake. I saw him hand the flashlight to her. I didn't see the person that handed her the flashlight. There was no light in the room when I saw the flashlight come in the window.

My sister was laying in the bed when I saw her get this flashlight.

She was sitting up when she handed the flashlight to him.

The Court: Did you say you saw this person that handed the flashlight to your sister, this man that handed your sister the flashlight, did you see him, could you tell who it was at that time?

After someone handed my sister a flashlight through a window, I saw someone come into the house.

I didn't see this person walk in through the kitchen into the bedroom.

I wasn't awake when this person walked into the bedroom. It was when I was awakened by some conversation I saw a person sitting on the bed. This is when my sister gave this flashlight to the person.

I saw him in bed with my sister.

129 I can't tell you what kind of flashlight it was, I didn't see it. I saw the flashlight lit. That is when I saw the man's face. I had never seen the man before. I didn't tell Mr. Davis that I had seen him before. I didn't say that to him while he was in our house or when the deputies came in.

130 The Court: Did you tell Joe or Mike when the defendant Davis was there that he was the man?

The Witness: Yes.

The Court: Was he there when you said that, do you remember?

The Witness: No.

131 Q. Did you see this person leave your home on this early morning?

The Court: She has testified to that twice, counsel; you asked her once and she said she didn't and you asked her if he left by foot or automobile.

Mr. Snively: That was the other witness, your Honor, not this one.

The Court: Wasn't it this witness?

Mr. Canfield: Yes.

Mr. Snively: I did not.

I didn't see this person go out of the house on that early morning.

132 JOE FERONA, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am a deputy sheriff. I saw the defendant in October.

133 My partner Mike Iasparro was with me. We went to his home. We knocked on the door. He let us in. I asked him if he would come with us to the Templeman home. He said "I will be glad to go with your fellows, but I have never been over there."

We drove him to the Templeman home. We parked out in front. We asked him if he had been in there. He said, "No." We asked him to come in. We wanted him to see the people and them to see him.

134 He led the way with me behind him and my partner to the front door. I knocked. We entered the house from the west side. We went into the kitchen. He walked into the bedroom. I had him face the kitchen. Then I had Mike have the mother and two girls look at him.

I asked him if he was in this house approximately 3 weeks ago, 2 weeks ago. He said, "No, I was never in the house." I said "You seem to know your way around to the bedrooms." He said, "All bedrooms are alike."

I asked Mike if they were through. He said, "Yes." I said "Let's go." So we took him out to the car.

135 Q. What was said there in the presence of the defendant James Davis?

A. There is one thing I forgot, this little girl—I forgot what her name is—in the house he saw her run to her mother and said, "That is the man."

Mr. Snively: I object to that, your Honor, and ask it be stricken out; it is not responsive.

The Court: It may stand.

136 My partner said the mother and daughter recognized him by his voice only, but the little girl definitely said that was him.

We were just inside the car.

Then we asked James Davis if he was in that house. This time he said he thinks he was there, he wasn't sure. Then we drove out to Atwood factory where Mr. Pollitt works. He said, "That is the man, that is the man." The defendant then started to cry.

We asked him why he was crying. He said he was nervous and hungry. We asked him to tell us all about it. I handed him the pad. I don't know what
137 the defendant wrote. He pulled it out of my hand, tore it in little pieces.

My partner and I took him to the Sheriff's office and in the presence of Iasparro, and McDonald, Assistant State's Attorney, he was questioned. He gave me a statement. I have it in my pocket.

(Witness is shown People's Exhibit 1.)

Q. And would you tell the Court and jury under what circumstances that was taken?

Mr. Snively: Now, the defendant requests a hearing outside the presence of the jury.

And thereupon the following proceedings were had outside the presence of the jury.

Direct Examination by Mr. Canfield (Cont.).

I wrote that. I typed it out. He signed it. I typed exactly what he told me. He signed of his own free will. I made no promises. I used no threats or acts of violence toward him.

139 He read it.

Cross Examination by Mr. Snively.

The Court: Who was present, you and Mike, and the defendant and McDonald, is that right?

The Witness: That's right.

140 It was approximately 8:15 before he made a statement. We picked him up about a quarter to 7:00. He was not eating supper when we went to his home.

141 I don't know if he was getting ready to eat. He was nervous.

If he had asked if he could call a lawyer, I wouldn't have let him, not at that time.

142 No members of his family were present. He told us he did not commit anything sexually, but he told us he did go to the house. He said he told the little girl to go to bed. He got on top of her, but had no sexual offense.

I wrote down just about everything he told me. I wrote down that he didn't commit this charge. I didn't advise him that he didn't have to say a word. I wanted a statement.

144 I didn't promise him anything.

145 MIKE IASPARRO, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am a deputy sheriff. I was present when James Davis signed People's Exhibit 1. He read it before he signed it.

146 He said everything was the truth. He wasn't offered or promised anything. No threats were made. He signed it of his own free will.

Cross Examination by Mr. Snively.

Joe Ferona typed this statement. He typed all that was said.

I didn't promise him anything.

147 We both told him he could have a lawyer. I didn't call any lawyer for him.

We asked him, "Were you forced to sign this?" He said, "No." "Were you promised anything?" He said, "No."

148 No members of his family were there. He was not represented by counsel.

He didn't appear to be too nervous, not too nervous, no.

149 JAMES DAVIS, the defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I am acquainted with Joe Ferona and Mike Iasparro. They didn't come to my home on October 14, 1955. They came to my sister's house. I was there.

150 I didn't know the officers were there until my brother-in-law told me. I was eating supper. They said they wanted to see me. They said they were going to take me to a house. They didn't say where.

They drove up in front of a house. Ferona went in the house. He said, "I will see if anybody is up." They took me in, rushed me in the bedroom, and shined a light on my face. There was nobody there I could see.

151 There was no light. It was dark. Nadine Templeman didn't come into that room where I was. She never was in there.

It took quite a while to reach the court house. They took me three different places. They drove me around for at least an hour because they didn't think they had anything on me.

152 They took me to a factory. Ferona talked to some guy and brought him. He came over to the car and looked in the window. He shook his head. Ferona must have asked him something. Then we left. They took me to the south end of town.

153 They questioned me. I asked, "What is this you are trying to get on me, what time did it happen?

They questioned me at least a half hour at the court house. They promised me if I signed a statement I could go home with my wife and eat supper. They promised me that.

They didn't say anything about putting charges against me. Ferona took something out of a file. He said you did this and that and wrote it down. I don't know why I ever signed it. I am not able to read or write. I never did learn to read.

154 I didn't make a statement. Ferona made it. He made all the words. I didn't know a thing about it. I didn't tell them, "This is the truth and I hadn't been promised anything."

156 I asked for a lawyer. They wouldn't get me one. They wouldn't let me get in touch with nobody. Ferona said, "I won't give you nobody."

They didn't tell me that if I made a statement, it could be used against me in court.

They didn't tell me that I was not required to talk or make a statement. They didn't advise me of counsel or anything.

157 *Cross Examination by Mr. Canfield.*

They promised me if I signed this I could go home. They told me I couldn't have a lawyer.

Mr. Snively: The defendant moves to suppress 158 as evidence against him the confession or statement made by him on October 14, 1955, to Joe Ferona and Mike Iasparro and marked People's Exhibit Number 1 on the following grounds:

1. The methods used to obtain the statement or confession were in violation of his constitutional rights.

2. The statement or confession was obtained by duress or coercion.

3. The statement or confession was obtained by secret and persistent interrogation.

4. He was not properly and completely advised of his constitutional rights.

5. He was not properly and completely advised that he was not obligated to talk or say a word.

6. He was not properly and completely advised that he was entitled to the benefit of counsel or the help of his family.

7. He was compelled to be a witness against himself in violation of his constitutional rights.

8. The statement or confession was not made voluntarily by him or of his own free will, but was induced by promises made to him.

The Court: Objections overruled.

159 And thereupon the following proceedings were had in the presence of the jury.

JOE FERONA, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

(Witness is shown People's Exhibit 1.)

It was signed by James Davis in my presence.

160 He told me what he signed was the truth. Mr. Friberg was in his office. He came in before he signed. McDonad was present during the time we questioned him.

Mr. Canfield: I offer it in evidence.

Mr. Snively: I renew my objections.

The Court: Let the record show the objections. You may read it to the jury.

(Witness withdrawn)

162 E. G. ROBERTS, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am a physician and surgeon. I have practiced here about 12 years.

I examined Anna Nadine Templeman on September 18, 1955.

163 I made an examination of her vagina and its secretions. The hymen was torn in two places. There was hematoma.

164 There were sperm cells in the vagina.

165 *Cross Examination by Mr. Snively.*

I couldn't state the exact time these tears occurred.

It was my impression that this was the first time the vagina had been entered.

166 I am the family physician. I have been acquainted with the family approximately 3 years.

167 JOE FERONA, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross Examination by Mr. Snively.

I went to his home at 226 Atwood Avenue. He was home. He was not eating supper, I know that. From there we went to 2811 Fairview Avenue. It was at that time he told me he had never been to that house before.

168 He led the way to the back door. Mrs. Templeman, Nadine and the little girl were there. It was about 7:00 o'clock. There were no lights. He went into the bedroom. No one was with him.

169 No one shined a light in his face. The only question I asked him was if he had been to the house before. He said he had not. I asked him some questions. Iasparro, Mrs. Templeman, Nadine and the little girl were in the next room. I was in the bedroom.

170 Iasparro was not in the bedroom while Davis was in there.

That is the only time that Davis has been there, but I have been there several times.

171 I remained there in the house on that occasion about 15 minutes.

I went to Atwoods factory. Mr. Pollitt came out. Mr. Davis was in the car with Iasparro. The window was open, the door was closed.

Pollitt didn't say anything to Davis.

172 I had a conversation with Pollitt but I don't know if Davis heard him or not. I was there about 10 minutes.

I took Davis to a little office in the court house. Mike and I were in the room at the time I commenced my examination of him. McDonald came
174 in. We had questioned him approximately 5 minutes. I continued to question him about 20 minutes before I started typing the statement.

175 On arrival at the Templeman home he said he was never in that place, as I left he said he thinks he was there one time or another.

We always tell that he has the right to the advice of counsel. If he asked for an attorney, he wouldn't have had one. McDonald was there. He was an Assistant State's Attorney.

We advised him that anything he said could be used in court.

I didn't write anything that he made the statement voluntarily and of his own free will.

177 The last line says, "I swear this is the truth and I was not promised anything." That is the customary last line. He said, "I swear it is the truth" four or five times.

178 At the time I typed this statement I had the reports I had made relative to an investigation on September 18, 1955. I went by the report of call.

179 At that time we weren't interested how he got there. We were interested in finding out if he was in the house. I didn't ask him whether he drove there in an automobile or walked there.

180 I didn't ask him how entrance was made to the home.

181 I didn't say to him that if he would make a statement and clear this thing up, he could go home with his wife.

I wanted to establish he was in the home.

I wanted to get his name on this paper.

A. There is one answer I would like to retract. I think the place of arrest was his sister's home on Concord Avenue.

Q. So, you can be mistaken.

A. Yes. If I am, I will correct it.

The Court: Now, try the case and get going on it.

Mr. Snively: That is all.

The Court: People's Exhibit 1 may be admitted in evidence and read to the jury.

Winnebago County Sheriffs Department
Court House
Rockford, Illinois
Leonard A. Friberg, Sheriff
Kirk S. King, Chief Deputy

Report of Call No. 41861

Statement taken from James Davis, October 14, 1955.

My name is James Davis and I am 28 years old and I live with my wife at 226 Atwood Avenue, Rockford, Illinois, Winnebago County. On the morning of September 18, Sunday morning, I want that it was I that entered the Templeman home living at 2811 Fairview Avenue, Rockford, Illinois. It was about 4:00 A. M. and I went to the rear window and rapped on the window and a young girl let me in and I told her to go to bed. I got on her but I didn't have anything to do with her sexually. After a while I heard some noise in the house and I left out the back door. A few nights later I tried to get in again but when I looked in the window I saw a man where I had at first saw a girl, and I ran away.

I swear that this is the truth and that I was not
183 promised anything.

James Davis

Witness

Joe Ferona
Mike Iasparro
L. A. Friberg

Defendant objects to the reading and asks that it be stricken out for the reasons heretofore urged to the court.

Motion overruled.

Court adjourned to February 17, 1956.

Court convened February 17, 1926, pursuant to adjournment.

MIKE IASPARRO, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am 38. I am a deputy sheriff.

I had occasion to go to the Templeman home on October 14, 1955, with Joe Ferona and James Davis.

186 My partner took the subject into the bedroom. I didn't go into it.

The little girl said that he was the man in the bedroom that night. The defendant was there at the time.

187 He was a matter of a few feet from her.

We then went to Atwoods Mr. Pollitt told us in the presence of the defendant he was the man he had seen at that house.

We left there. W received a fire call. We asked the defendant if he would like to come along with us. He said he would. Before we go to the fire he had readily admitted to us he was the person that went in there.

He said he had gone into that bedroom and had done nothing to her but lay on her. He started to write on a sheet of paper and then handed it to me. I started to read it. It said, "I, Jim Davis,

was at the Templeman home, but all I did was lay on her." I took the statement and handed it to my partner. When I did that, Davis grabbed the
188 *statement and ripped* it up and threw it out the window.

Ferona was driving. I was in the front seat. Davis was in the back seat.

When we got to the court house, we took him in the room adjoining the sheriff's office. He gave us a full and complete statement.

He said he went in the bedroom, all he did was
189 lay on the girl. We asked him, 'Did you give this freely and willingly?" and he said, "Yes."

We were in this office 20, 25 minutes before he signed.

(Identifies People's Exhibit 1.)

He signed of his own free will.

190 There were no threats or promises.

Cross Examintaion by Mr. Snively.

I believe I first saw James Davis on October 14 at his sister's home on Concord Avenue. We were both at the door together.

191 I can't remember who rapped. My partner asked Davis to come out to the car. He sat in the car and talked. We took him to the Templeman home. I would judge it was 2, 2½ miles there.

192 Atwood Avenue is west of Concord Avenue. It is about a mile.

194 I believe Ferona drove from Concord to Fairview Avenue. We stopped at 2811 Fairview Avenue. I believe we pulled into the driveway.

We all got out. Ferona didn't get out and tell us to wait until he went into the house.

I started toward the house. I entered the front door.

I think Joe was first to enter, the subject was in the middle, and I was behind.

196 Davis was in the bedroom. I didn't go into it.

197 I could see Davis. I believe Joe went in with him. I didn't hear Ferona say anything to Davis while he was in the bedroom with him.

198 I didn't have a flashlight. Ferona may have, I don't know.

I think Nadine was in the bedroom with Davis while he was there.

199 We were in the house 15, 20 minutes. It was dark
200 outside. When we started out, we were all together in the living room.

I didn't hear Davis say anything while he was in the house.

201 I didn't hear Mrs. Templeman or Nadine say anything in his presence.

As we left the house, we all went to the car.

I didn't say anything as we came out.

202 I think Davis said something.

We went to Atwoods. Davis and I sat in the car.

Ferona talked to Mr. Pollitt. He came over closer to the bar and looked in. He was a few feet away. He said something.

204 He shook his head. No, he didn't shake his head. He said, "That's the man." Davis didn't say anything.

205 He stood by the car I imagine 30 seconds. I am positive the dome light was on.

206 It remained on as long as it took for Pollitt to take a good look at him.

207 Pollitt came over to the left side of the car. The back window was down. The light was on.

We got a fire call. We asked Davis if he wanted to go along.

208 The fire was out when we got there.

209 From there we went to the sheriff's office.

210 We took Davis into a room next to the office.

We questioned him 15, 20 minutes. I can't remember that I had a report there before me as I was questioning him.

214 I didn't write up a report of the investigation I made on September 18. I didn't see Ferona have any other papers before him as he was typing.

215 I believe Davis asked for a lawyer. He didn't have a lawyer at any time while I was in that room. None of his relatives were in there with us. I think his wife was sitting in the lobby. I didn't give her an opportunity to come in while I was questioning him.

216 We may have told him it could be used as evidence. It was explained to him.

217 He was a little nervous. I didn't hear him say he was hungry.

He told Ferona, "I swear this is the truth and I was not promised anything."

218 It is usually the last line we put down.

He gave the statement to Ferona. As he gave it, he typed it.

He read it out loud. We asked him if he could read, he said, Yes. We asked him to read it out loud and he did.

I would say that each of the words in the statement are the identical words given to Ferona and me by James Davis.

Mr. Friberg was not present when I questioned Davis. He was in the adjoining room. No one else was present.

219 There wasn't anyone there from the State's Attorneys office while I questioned him.

I talked to Dr. Roberts yesterday before he testified. Ferona and I have talked together since he was on the witness stand yesterday.

220 I also talked to Mr. Canfield this morning.

The plaintiff rests.

Whereupon the following proceedings were had outside the presence of the jury.

Mr. Snively: If the court please, I wish to renew my motion to compel an election.

The Court: That motion will be reserved.

221 Motion for Directed Verdict as to First Count, at Close of Plaintiff's Case.

222 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

223 Motion for Directed Verdict as to Second Count, at Close of Plaintiff's Case.

224 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

225 Motion for Directed Verdict as to Third Count, at Close of Plaintiff's Case.

226 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

227 The defendant, to maintain the issues on his part, introduced the following evidence:

ANNA K. DAVIS, called as a witness on behalf of the defendant having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I have lived at 218 Atwood Avenue 23 years. I am married. I have 5 children. John, 32, and James, 28, live at home. James lived at 226 Atwood Avenue on September 18, 1955.

229 I am a practical nurse. I have been so employed approximately 9 years. I was employed on September 18.

230 I was employed at Cherry Valley Nursing Home. In September, I was employed 3:00 o'clock in the afternoon until 11:00 o'clock at night. I left about 2:20 and arrived about 3:00.

231 I would leave there 11:10 or 11:15 to return home. James, his wife Imogene, and John took me to work. James owned an automobile. We all went together.

James was employed at Geo. D. Roper Corporation. I believe he was employed 3:00 to 11:00 in September.

232 The same group came after me. I was employed every day but I had Sunday, September 18, off.

On September 17, the same group took me to work.

233 I left for work at 2:20 that day. I arrived at Cherry Valley at 3:00. The same group came for me. We left 10 or 15 minutes after 11:00 o'clock. We got home just about 12:00.

234 James took me directly home. We drove in the driveway. I didn't go into my house. All of us, John, James and Imogene went to their home and watched television.

235 We watched television until about 2:00 in the morning. It was WTMJ Milwaukee.

We had lunch and then I sewed, fixed a dress for Imogene. I told her I would fix it some night after work. I sewed and then we went home. It must have been between 4:15 and 4:30. There wasn't anyone left his home.

236 James did not leave from the time I went there at 12:00 o'clock until I went home between 4:15 and 4:30, neither did his brother John or his wife Imogene.

I had the keys to the automobile when I went home. I have them every weekend, but I didn't use the car that Sunday morning.

237 James had a Ford automobile. He drove it into the garage. It was in the garage when I went home with John that morning. I left James and his wife in his home.

He had a nervous condition He has been in the military service. He was given an honorable discharge.

238 He had this nervous condition since he was a small child. He was injured between 4 and 5.

239 He was playing in the basement. He ran in the coal bin. The coal started to roll and caught him. My husband came down. He couldn't get him out, so he went for a neighbor. James was in there a long time. You couldn't see anything but a bit of his head.

He also was in an automobile accident. He was
240 in the hospital.

Cross Examination by Mr. Canfield.

I usually get up between 10:00 and 11:00. All three hauled me to Cherry Valley that day.

241 That night I got home about midnight. I listened to television until about 2:00. Then I had a little lunch. I put my hair up on curlers. I put it up long before I go to bed.

242 James was there. He was where I could see him. We went home about 4:30.

243 I don't stay up until 4:30 every night, but I do very often. James was home with his wife. I know he was home. I had the keys. I told you I had the keys so I wouldn't have to wake them up in the morning.

244 I had them in case in needed them. John drives me to the store.

245 James didn't have other keys to his car. I know he didn't have but one set.

I don't remember going to the store that particular morning but I have gone a lot of Sunday mornings. No sir, it was 4:30 when I went home.

246 *Redirect Examination by Mr. Snively.*

I had the keys every weekend especially for Sunday mornings when I would want to go to the store.

The car was in the garage at my home. They haven't a garage at their home.

247 IMOGENE DAVIS, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I am the wife of James Davis.

248 He owned a Ford automobile. There was one set of keys for it.

In September, my husband, brother-in-law and I took Mrs. Davis to work. We took her on Saturday, September 17.

249 It was approximately 2:30. It took us around 45 minutes to get there. She had to be at work at 3:00. I am not positive but I think it was around 5 or 10 minutes after 3:00 when we got her there.

We went home after we left her. We remained there until 10:30. My husband, brother-in-law and I went to Cherry Valley.

250 My husband was driving. We waited until Mrs. Davis came out. We left at 11:00 or 5 after. We drove to 218 Atwood Avenue because we used the garage and walked over to our home.

My mother-in-law, brother-in-law and husband accompanied me to our home.

251 It was around 11:35 or 11:40 when we arrived home. Mrs. Davis and John remained until around 4:30.

We watched television until 2:00. We then had ice cream and cake.

252 My mother-in-law and I served. Then she helped with a dress. My husband didn't leave there. He wasn't outside of the house at any time. He was in the living room with us. John left with his mother.

253 They went home. We went to bed after they left. We got up around 12:00 Sunday morning. My husband had been there in bed from approximately 4:30 until we got up. We always stayed at home except when we get his mother.

I recall the evening that the officers came when we were at his sisters at 100 Concord Avenue.

254 Anna Dorris, Elwyn Dorris and their children were there. My husband and I were there and I think John Davis. We had just sat down to the supper table. Mr. Dorris went to the door. My husband was at the table. He got up. Mike Iaspafro was at the door.

255 Joe Ferona was not there. He was in the car. He asked to speak to my husband. He went out. He remained 5 minutes with them and they took off.

256 It was the next day I saw my husband.

Cross Examination by Mr. Canfield.

I got up around 11:30, 12 o'clock on September 17, 1955.

257 I recall what I did on September 17, because of the Walshes. We had been talking about it. I read about it in the paper.

258 I am sure that the events I am talking about took place on the night of the 17th. The night of the 16th when he got home from work, we went for groceries. We went to bed around 12:00. On this particular day all three of us went to Cherry Valley to take my mother-in-law down.

259 We listened to television a couple of hours, until 2:00 o'clock. We had ice cream and cake.

260 Then my mother-in-law put a hem in a dress. After that she went home. My husband was up at that time and fully dressed.

She said, "It is 4:30, I guess it is time to go home."

Redirect Examination by Mr. Snively.

262 I remember I happened to read about the Walsh family in the newspaper. It was the family that had polio. I also remember my sister-in-law said it was on television.

Recross Examination by Mr. Canfield.

I remember about this family in Durand having polio. That is how I established the date. All I remember is that once in the paper.

(Recess 11:55—1:30)

264 IMOGENE DAVIS, recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I came to the court house on October 14, 1955, but I didn't see my husband. At that time Joe Ferona and Mike Iasparro talked with me.

They asked me where I and my husband were that early Sunday morning. I told them.

265 Iasparro talked with me around 40 minutes. Anna Dorris, Elwyn Dorris, Joe Davis and his wife were there.

My husband was working 7:00 in the morning until 3:00 in the afternoon in September.

Anna Dorris took Mrs. Davis to work on the days other than the weekend.

266 Her children and John Davis accompanied her and sometimes I went.

My husband was not employed at Ropers on September 17 and 18.

Cross Examination by Mr. Canfield.

I am 15. I was 13 when I was married.

267 My husband took his mother to Cherry Valley just on the weekend.

268 He didn't take her during the week which ended with September 17, 1955. He took her the 17th and 18th.

ELWYN DORRIS, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

269 I am 31. I am employed at Goss Printing Press Company.

I recall Mike Iasparro coming to my home on October 14, 1955.

270 It was between 6:00 and 6:30. We had sat down to the table. We had just said grace, passed the dishes, and started to eat.

Someone tapped at the door. I started toward the door. Iasparro motioned toward Jimmy.

271 He said, "No, we just want to talk to Jimmy for a few minutes."

I didn't see Joe Ferona at my door that day.

272 We finished our supper.

I saw James Davis when I went down the street to go to work. He was sitting in the squad car. I wouldn't say how long it took me to eat supper. I just ate and went down the street.

Mr. Canfield: No cross examination.

273 JOHN DAVIS, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively:

I am 32. I am a brother of James Davis.

274 I have driven and ridden in his automobile. There was only one set of keys.

My brother was employed 7:00 in the morning until 3:00 in the afternoon. He worked five days. He has never worked weekends.

275 My mother worked in Cherry Valley 3:00 to 11:00. On weekends my brother, James, took her.

276 My sister, Anna Dorris, took her during the week. I went with my mother. Her children and Imogene would go during the week days.

My brother, James, Imogene and I took my mother to Cherry Valley on Saturday, September 17, 1955. We left at 2:20.

277 After we had taken my mother to Cherry Valley, I was at his house. Imogene cooked supper. My brother, James, was there. We stayed at home that evening. We talked and watched television. We had a television at our home but it was broken.

We left to get my mother at 10:15. Jim, Imogene and I went. My mother returned with us to Rockford. Jim drove.

278 We came straight home. It was around 12:00 o'clock. He put the car in the garage at our place.

We all went to his house. We watched television until late. I tuned in Milwaukee. I watched it real late. We ate and then talked.

279 We stayed there until around 4:30. Jim and his wife were there when we left. No one went out of the house from the time we reached there. Jim did not leave his home at any time between 12:00 midnight and 4:30 that morning. When I started home, my mother went with me.

280 The Ford automobile was in the garage when we went home. One of the doors was off. I know positively that the car was there.

Cross Examination by Mr. Canfield.

I am not married. I live with my mother.

281 I wasn't employed in September.

My brother was working days. He went to the three to eleven shift.

282 I remember a telecast of the Walsh case in September when they appealed for funds.

283 It was around that time, the 16th or 17th.

284 During that time we did the same thing every weekend. I remember the 17th better than any other day in September.

We went to Cherry Valley to get my brother.

285 My brother drove down and back. He drove to his house because we went there and watched television.

286 James put the car in the garage.

287 We waited. We all went in together.

288 The car was parked in a garage about 75 feet from his house. He rents from us.

289 We listened to television until 2:00 o'clock. We had ice cream and cake. I had pop. My mother was ironing, talking and things in general.

290 I can't remember everything she was doing. We sat around a couple hours after the television was off. It was real late when we went home.

291 It was just starting to get light when we left. Mother said, "My it is late, isn't it?" and I said, "Yes."

292 I know it was 4:30 because it was getting daylight.

293 JAMES DAVIS, the defendant, called as a witness on his own behalf, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I am 28. I was living at 226 Atwood Avenue on September 17, 1955. I own the place.

294 I am employed by Geo. D. Roper Corporation. It will be 8 years next April. I was employed there 7:00 to 3:00 in September.

I owned a Ford automobile. I got it in May. There was one set of keys.

295 I recall Saturday, September 17, 1955. I didn't work that day. I haven't worked Saturday or Sunday.

My mother was employed at Cherry Valley Nursing Home. I have been there every weekend. I didn't take her to work other than Saturdays and Sundays.

296 My sister took her on week days. She worked 3:00 to 11:00. My mother left for work on Saturday, September 17, at 2:25. My brother and my wife went along.

297 I drove. We went right back home. It was about a quarter to 4:00.

298 We remained there until about 10:20 and then we went to Cherry Valley. I left there about 5 or 10 after 11:00. We arrived home about 5 minutes to 12:00.

I put my automobile in the garage. We all walked over to 226 Atwood Avenue together. We went in the house and talked and watched television until real late. It must have been 2:30.

300 My mother helped my wife with sewing. My brother and I was talking. I asked what time it was. He said it was getting late, it must have been about 4:00 o'clock in the morning. I looked at the clock. You can see the clock right in the bedroom. It was 4:00 o'clock when I looked.

301 They were still sewing. My mother and brother left about 4:25. They went out on the porch. We talked about 5 minutes. They said they were going home.

302 My wife and I went back in the house and talked. I didn't leave there at any time. I was too tired.

303 We went to bed. I got up around 5 minutes to 12:00.

304 I recall October 14, 1955, when I was at my sister's home. When I went out Ferona and Iasparro were in the car.

305 They asked me to set in the car. They wanted to talk to me and I could go back in the house. They talked to me 5 minutes. They wanted to take me somewhere, I didn't know where. They didn't tell me. They were talking but I didn't understand what they said.

I didn't know where I was when they took me there. I have never been in that house or on that street before.

306 Ferona said, "I am going to get out. I am going to go in and see if the people is there." He went in the house approximately 3 minutes. Iasparro was in the front seat.

Ferona came back to the car. He said, "We are going in the house." It was dark. They took me in a side door. As soon as they got me in the house, they rushed me in the room, wherever it was.

307 There was no light. Ferona shined the flashlight in my face. I didn't see anybody around. I was scared. They brought some girl. I had never seen her before in my life. Ferona and Iasparro were talking. Ferona went over to the girl. He was talking to her. She wouldn't listen to him. There was one girl, no more. He whispered to her. I didn't hear what he said.

308 The girl, she wouldn't say nothing. She wouldn't say a word. Iasparro and I walked outside. Ferona was inside with the girl.

There was nobody in the rooms when we went in. The woman was sick.

Darla Templeman, a witness who testified here, was not in that room. It was dark. The kitchen light was on but you couldn't see the girl very good. Ferona and Iasparro were standing beside me. They didn't let me see the girl too well.

309 I couldn't swear which girl it was I saw there. The mother wasn't there, only one girl was there.

310 Ferona didn't say anything to me while he and Iasparro were there in the room with me. He just shined the flashlight in my face. Iasparro didn't say anything to me.

Ferona didn't ask me if I had ever been in there before. Ferona or Iasparro didn't ask me that in the presence of Hazel Templeman, the mother, who testified. The mother wasn't there.

311 Ferona told Iasparro to take me to the car, he wanted to talk to the little girl. We went to the car. He stayed there.

I didn't see any other person there besides the little girl and the two deputies. That was all there was there.

312 Iasparro told me to get in the back seat. We sat there until Ferona came out. He said the little girl was pretty sure I was the one.

Iasparro didn't come out to the car and say that they had positively identified me. The first time I heard that statement was in court yesterday.

They said they was pretty sure I was the one.

313 I said, "I wasn't." They didn't believe me and said, "I will show you to another guy." They took off to the Atwood factory. Ferona got out. He went to talk to some guy. I didn't hear what they said. He came over to the car. He shook his head but I didn't hear what he said. He went back to Ferona.

He turned his head from side to side. He looked at me and walked away, that is all. I had never seen the man before. I don't know who he was.

I believe they turned on the light. When he turned it out, I seen his face. He looked again and shook his head. Iasparro turned off the light. He went back to Ferona.

No window was open. I didn't hear this person say anything while he was there.

315 Iasparro didn't have any conversation with the man. They asked me if I wanted to go to a fire. I didn't have any choice.

316 On the way they tried to get me to sign a statement. They put a pad up. I told them I couldn't write. They got mad. Ferona started like he was going to beat me up. I got scared. He said, "If we can't get a signed statement, well I want to beat him up." Iasparro calmed him down. He said, "You ain't going to get nowhere that way." I didn't write anything. I told them I couldn't write. How can I write anything when I can't write? I can't write big words.

317 I didn't ask them to give me any paper to write out a confession. There wasn't any paper torn up in the car. Ferona was pretty mad when I wouldn't sign the statement.

It was raining that night. They said they were going to take me out west of town.

318 We reached the court house about 7:30. It was supper time, around 6:00 o'clock when the officers came to my sister's. They took me in the office.

319 Just Jasparro and Ferona was there. Ferona asked the questions. He pulled out a report. Iasparro saw it. I saw it too. Ferona operated the typewriter. He said there was a report something happened. He said something happened, he wouldn't tell me what. They wouldn't give me no information.

He said he had three or four witnesses outside to prove that I did it. He said he had them right there and he threatened me with the witnesses. He said, "If you will sign the statement, I will let you go home with your wife and eat supper." I want to get this case cleared up. He said, "I don't care how I do it, I want to get it cleared up."

I asked him for a lawyer and he wouldn't give me one.

321 I didn't have the assistance of a lawyer. They didn't say that anything I said might be used against me in court.

I never said a word in that statement. He made the words out of the report and his mind. He said he had three witnesses to prove where I was. He said if I would sign he would let me go home. I told him I wouldn't sign. He kept after me. He said, "I am going to send the sheriff in here." I was nervous, scared and hungry. I was just scared.

322 I signed the statement. It was not read to me. I read most of it but I couldn't read all of it. I couldn't understand it.

323 No one came into the room while they were talking to me. I didn't get a chance to talk to my folks. They were in the court house.

324 No warrant was served on me. I was taken to jail. I was taken to the State's Attorney's office from the jail. I am pretty sure it was on a Monday. It wasn't Ferona and Iasparro that took me there.

The Assistant State's Attorney showed me the statement. They asked me if it was true. I said, "No."

Mr. Snively: Can't we show what occurred in this room, your Honor?

Mr. Canfield: We object to it.

Mr. Snively: I don't want to persist, your Honor?

The Court: You won't persist, you try the case. I have ruled on it.

I didn't, on September 18, 1955, forcibly and against the will of Anna Nadine Templeman make an assault upon her forcibly and against her will and carnally know her.

327 I didn't, on September 18 1955, then and there being a male person of 17 years, have carnal knowledge, that is, intercourse, with Nadine Templeman, a female person not my wife.

I didn't, on September 18, 1955, in and upon Anna Nadine Templeman, a female person, make an assault with intent then and there upon the said Anna Nadine Templemen forcibly against her will to carnally know and ravish her.

Cross Examination by Mr. Canfield.

I finished the 8th grade but I can't read and write.
328 I got E's in spelling and arithmetic.

I was working 7:00 to 3:00 p.m. in September. My mother was wrong when she said I was working other hours.

I was home with my wife on Saturday, September 10, 1955.

329 I went to bed at midnight.

I was at home on September 24, 1955. I think I went to bed at 3:00 o'clock in the morning.

330 We listened to the television and went to bed.

I remember reading in the newspaper about the Walsh case. They asked for prayers. My wife read it, I couldn't read it.

I went to Cherry Valley on the night of the 17th. I came back and drove my car right in the garage.

331 The garage is about 50 feet from the house where I live. They all got out. Then we all went to my house.

My mother was sewing. It was after television was over.

332 My mother and brother went home about 4:25. I looked at the clock.

333 It was in the bedroom on the vanity. I could look right in and see what time it was.

334 I didn't know the Templemans. No sir, I never knew them. Not that I know of they never lived in my neighborhood. I had never been on Fairview Avenue.

I wasn't there on the night of the 17th or a week later. I wasn't there on September 25.

335 I had never seen Erwin Leroy Pollitt before I saw him at the Atwood factory.

336 I didn't read all of People's Exhibit 1 before I signed it. I can't read all of it. I can't understand all the words. It is my signature.

Nobody hurt or threatened me. Just promised me, that is all. They promised me that I could go home.

I didn't do a thing like that (on the statement).

337 I don't know why I signed it. I was nervous.

At the time Ferona was driving the car, he was acting mysterious. He acted like he wanted to beat me up, that is the way he acted. Iasparro tamed him down. He said, "Calm down, Joe." That is all I can remember.

I didn't tell them my name was James Davis and I was 28. That had that in the statement.

338 They had called the date of September 18, 1955, to my attention. I had reason to know I didn't do it because I was with my mother. I know that.

339 I have told you what I did every weekend. I remember that weekend special because what my wife read.

340 She showed me this piece in the paper, read it to me, that this family needed prayer.

I know I was home.

341 *Redirect Examination by Mr. Snively.*

I heard Mr. Canfield read this statement to the jury yesterday. It is not true.

342 ANNA K. DAVIS, recalled as a witness on behalf of the defendant having been previously duly sworn, was examined and testified as follows:

Redirect Examination by Mr. Snively.

I wish to correct my testimony relative to the time I thought my son was working in September. I made a mistake. At that time he was working the day shift 7:00 until 3:00. Then my daughter takes me to work.

343 My daughter, my son John, and my daughter-in-law Imogene took me to work on week days. James, John and Imogene took me to work on Saturday and Sunday in September.

Recross Examination by Mr. Canfield.

I suppose I got a little confused because they change. I made a mistake. I should have said 3:00 to 11:00. He worked Monday to Friday.

The defendant rests.

The plaintiff, to further maintain the issues on their part, introduced the following evidence in rebuttal:

345 ERWIN LEROY POLLITT, called as a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

I am 32. I worked at Atwood's on October 14, 1955.

Mr. Snively: I object to any testimony by this witness in rebuttal. This is testimony that should have been used in chief in their case.

The Court: Objection overruled.

346 The first time I saw the defendant was at the Templeman home flashing a flashlight in the window. The date I saw him was September 25. He was at the northeast window, peering in.

347 I was there because the parents hired me. I saw him when Ferona and Iasparro brought him to Atwood's. They asked me if I would identify this man.

348 The first thing I did was to look through the window. I could see him. I had seen him at 2811 Fairview Avenue September 25, 1955, at 4:20 in the morning.

349 There wasn't any conversation in his presence when I saw him on October 14.

Cross Examination by Mr. Snively.

I have been acquainted with Cletice Templeman 5 years. I was hired to go to the Templeman home. It was on the morning of the attack.

351 I went there to go to church with the people at 10:30.

I was sitting in the adjoining room to the girls with my wife on September 25.

352 I saw him in the northeast window. I was approximately 10 feet away. It was dark in the house. It was 4:30.

I want to tell this jury the man I saw was James Davis.

That is the closest I was to this man I saw looking in the window.

I sat there in this room from 1:30 until 5:30. There is part of a wall between the bedrooms. There is a large opening

I went directly to the front door which faces east. By the time I ran out the door and to the back of the house, he was gone.

I don't know where he was.

I was at work at Atwood's when the deputy sheriffs came there to see me. I got right up to the window. I saw James Davis in the back seat on the left side.

I didn't speak to him. I opened the door after I looked in at him to take another look. The windows were up. There wasn't any light in the car except this flashlight one of the deputies was holding.

Iasparro had the flashlight. Ferona talked to me before I came to the car.

He wanted me to identify the man.

Redirect Examination by Mr. Canfield.

He had a flashlight shining in the window. The light reflected back upon his face. His face was pressed against the window.

Recross Examination by Mr. Snively.

I didn't see whether the man left in any transportation. I didn't hear any car.

Mr. Templeman didn't agree to pay me. When you help friends, you don't get paid.

I was helping a friend.

361 JOE FERONA, recalled as a witness on behalf of the plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield.

Q. I show you what has been marked People's Exhibit 1, a statement taken by you in this case, I ask you before you asked James Davis to sign this if you told him if he signed this, he could go home and have supper with his wife,?

A. No, sir.

Mr. Snively: I object. He said nothing was said.

362 MIKE IASPARRO, recalled as a witness on behalf of the plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Canfield

Q. Did you hear Joe Ferona say to James Davis if he would sign this statement, he, James Davis, could go home and have supper with his wife?

A. No sir.

Cross Examination by Mr. Snively.

I heard everything that was said in that room that evening.

Q. You didn't make any notes other than what
363 Ferona wrote down on this statement?

Mr. Canfield: I object.

The Court: This is as to this particular conversation. In rebuttal it is proper if certain statements were made and attributed to certain persons, then you can ask in reference to that particular statement

in the language or in the substance what was said and ask him whether it was said or wasn't. It is limited to that.

Mr. Snively: If I may I would like to object to the testimony of both witnesses on the grounds that it is not proper rebuttal and ask to have it stricken out.

The Court: The court has ruled. Motion overruled.

The plaintiff rests.

The defendant, to further maintain the issues on his part, introduced the following evidence in surrebuttal:

364 JAMES DAVIS, the defendant, recalled as a witness on his own behalf in surrebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Snively.

I didn't go to 2811 Fairview Avenue on September 25, 1955. I didn't go there on that date and shine a flashlight in the window of that house.

365 I was at my home at 226 Atwood Avenue between the hours of 12:01 midnight on Sunday, September 25, 1955, and 9:00 o'clock.

366 Which was all the evidence offered or received on the trial of said cause.

367 Motion for Directed Verdict as to First Count, at Close of All the Evidence.

368 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

369 Motion for Directed Verdict as to Second Count, at Close of All the Evidence.

370 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

371 Motion for Directed Verdict as to Third Count, at Close of All the Evidence.

372 Motion overruled. The court refused to give to the jury the instruction tendered therewith.

And thereupon the trial of this case was adjourned to Monday, February 20, 1956, at 9:30 o'clock A. M.

373 Court convened February 20, 1956, pursuant to adjournment.

374-375 (Conference with counsel to settle instructions.)

The defendant objects to the giving of each and every instruction tendered by the plaintiff and marked "Given" by the court and to the refusal to give each of the instructions tendered by the defendant and marked "Refused."

376 And thereupon the following proceedings were had in the presence of the jury:

Opening Argument by Mr. Gaziano.

Mr. Gaziano: And from the facts in this case it is up to you, do you want the Templeman home, Anna Nadine Templeman to have had this crime committed against her virginity by James Davis from the testimony that is in the record here.

Mr. Snively: I want to object to this argument.

The Court: It has been gone over before; try not to go over the same ground the second time.

381-409 Argument by Mr. Snively.

411 Mr. Canfield: A girl was raped. It is an atrocious crime. It was a crime so violent that a man had to get his neighbors to come and help watch over his children from a person who came back again. It was that kind of a vicious crime. If there is any worse case than that, I would like to have you tell me what it is. He says maybe it isn't so bad. Here is a man that goes into a home and rapes a little fourteen year old in her own bed. I would like to ask you if there is anything worse?

You have your own home, you have the sanctity of your own home. The protection of any decent woman or child in bed in the night time is this law of rape, which we are enforcing here. You are enforcing the law that protects your wife and family.

Mr. Snively: I object.

The Court: Proceed.

413 Mr. Canfield: For an hour and five or ten minutes he picked at this and that. He never tried to tell you, "My witnesses said this or that." Nobody could believe his witnesses. When there was too much conflict in their testimony, they went outside and had a conference.

Mr. Snively: I object.

The Court: Objection overruled.

418 Mr. Canfield: Nobody but a man with a mind like James Davis would do that. He married a girl at 13.

Mr. Snively: Now, your Honor, I object to that. This is an outrageous statement of this State's Attorney.

The Court: Whatever the evidence shows, the jury may consider.

Mr. Canfield: This little girl was just a child. There are only a few people who are so gross and so careless they would rape a little girl like that in the bedroom in the presence of her brother and sisters.

Mr. Snively: I object,

The Court: Objection overruled.

419 Mr. Canfield: Now, ladies and gentleman, when outlawry gets so bold that a man invades your home, my home and rapes a child, anyone who would or could do that and try to come back—

Mr. Snively: I object.

The Court: Objection overruled.

Mr. Canfield: Now, he said they don't know how old this man is. I wouldn't be able to guess how old Mr. Snively is. This little girl couldn't tell how old the man was. You can't get involved in those little details; those are not important But it is important when the witness says that is the man who said, I will cut your guts out. Ladies and gentleman, that is the kind of a case you have got; that is why you can't go weak and soft on this. It is easy enough to say—

Mr. Snively: I object.

420 The Court: Objection overruled.

Mr. Canfield: It is easy enough to say, of course, he did it but we are going to turn him free. Ladies and gentlemen, I cannot imagine that happening here. I have seen that happen because juries have said, of course, he did it, but we will turn him loose. I can't imagine where a rape of this nature has been committed where you will turn this man free, a

man who has been identified in one of the most dastardly crimes that has ever happened in this county.

Mr. Snively: I object to that. It is not based on any evidence and it is not in reply to anything I said and it is not proper rebuttal.

The Court: Proceed.

Mr. Canfield: Mr. Snively tried to confuse you, there is no motive. You know as well as I do that in a rape case there is only one motive, that is the brute lust of the man involved. When you have a man so low who will go in a home and rape a fourteen year old, you don't have to worry about the motive.

He said the little girl wasn't ashamed. What did the little girl have to be ashamed of? She was in bed with her brothers and sisters, she was there and the man came in and violently raped her. She has
421 nothing more to be ashamed of than if somebody robbed you. He has tried to tear this girl down in order to confuse you. This little girl has nothing to be ashamed of. The only thing is that her life is blighted by the brutal and cruel rape by a debased person, who not only raped her in the presence of little children and threatened to cut their guts out—

Mr. Snively: I object.

The Court: Objection overruled.

Mr. Canfield: A man so debased as to commit this crime and this is the man who came in and not only threatened her in the presence of her brother and sisters, but came back a week later to try it again.

Ladies and gentlemen, this evidence—I have talked to you too long, I appreciate your staying with us through the trial, it has been a long trial. Ladies and gentlemen, the evidence here, we have proven it by six different ways that he is the man. It is all there before you. Don't hesitate and say, of course, he is the man but there is some doubt. Ladies and gentlemen, if you saw me pull out a gun and shoot the court reporter and you saw him drop dead, you know I killed him but somebody might say he dropped dead of a heart attack before the bullet got there. That is a fanciful doubt. There is no doubt in this case, the little girl recognized the
422 voice, one little girl saw his face, two officers witnessed his confession, and this other man identified him when he came back.

Any man who commits this kind of a crime, the atrocious crime and deny it and ladies and gentlemen—of course, any family who has a man who will do this in it and try to cover it up because they know what kind of a man he is and I think the finest answer to all this baloney and alibi of going out and coming back and tell different stories, their own counsel didn't have the courage to comment on it himself, it was so weak, ladies and gentlemen.

Now, ladies and gentleman, I ask you to bring in a guilty verdict. You have the right to set the penalty from one year to life, one to five, one to ten, fifteen, twenty, fifty years. Ladies and gentlemen, I ask you when you have a man who breaks into a person's home and rapes a child, you set that penalty for so long that he will never do it again. Thank you.

Mr. Snively: I object to the continued argument in that regard.

Which were all of the arguments of counsel to the jury on the trial of this case.

423 And thereupon the plaintiff tendered the following instructions:

424 1. The court instructs the jury that preliminary to your being accepted and sworn to act as jurors in this case, you were examined by the attorney for the State and by counsel for the defendant as to your competency and qualifications to act as jurors in this case. As a part of such examination, each of you answered all questions asked by the attorney for the State and counsel for the defendant. Your answers showed you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to said questions in regard to your competency, qualifications, fairness, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the case. It would be highly improper for you to disregard the answers that rendered you competent jurors. (Given.)

425 2. The court further instructs the jury, that, under your oath, you should not allow sympathy or prejudice to influence you in the least in finding your verdict in this case. In your deliberations you should not be influenced by anything other than the law and the evidence in the case. (Given.)

426 3. The court instructs the jury that you are to consider only the evidence that has been admitted or permitted to remain in the record of this case. And evidence, which the court refused to admit or that

the court struck from or excluded from the record should not be considered by the jury. Any evidence, admitted for a limited or specified purpose, should be considered by the jury only for the purpose for which it was admitted. (Given.)

427 4. The court instructs the jury that rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of fourteen years and upwards who shall have carnal knowledge of a female forcibly and against her will shall be guilty of the crime of rape.

Every person convicted of the crime of rape shall be imprisoned in the penitentiary for a term of not less than one year and may extend to life. (Given.)

428 5. The court instructs the jury, in the language of the statute, that an assault with an intent to commit murder, rape, mayhem, robbery, larceny, or other felony, shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years. (Given.)

429 6. The court instructs the jury that if, after considering all the evidence in this case, the jury finds from the evidence that any witness has or witnesses have knowingly, wilfully and corruptly testified falsely to any fact material to the issue in this case, then the jury has the right to entirely disregard the testimony of such witness or witnesses, except in so far as his or their testimony is corroborated by other credible evidence or by facts and circumstances in evidence in the case. (Given.)

430 7. The court further instructs the jury that the credibility of witnesses is a question exclusively for the jury, and that the jury has a right to determine

from the witnesses on the stand their manner of testifying, their apparent candor or fairness or the lack thereof, the reasonableness or unreasonableness of the story told by them, their apparent intelligence or lack of intelligence, the relations they bear to either party to the suit, their interest in the outcome of the case, if any, as shown by the evidence, or the lack of such interest, and from all the surrounding circumstances appearing in evidence on the trial determine which witnesses are more worthy of credit and to give credit accordingly. (Given.)

431 8. The court instructs the jury that the defendant, having become a witness in his own behalf, at once became the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to the testimony of the other witnesses, and in determining the degree of credibility that should be accorded to his testimony you have the right to take into consideration the fact that he is interested in the result of the prosecution, as well as his conduct and demeanor while on the stand, and the jury may also take into consideration the fact, if such is the fact, that he has been contradicted or corroborated by other witnesses. (Refused.)

432 9. The court instructs the jury that if in this case you find the defendant guilty of the crime of rape in manner and form as charged in the indictment, then you will also by your verdict fix the term of imprisonment of the defendant in the penitentiary, which shall be not less than one year and may extend to life, as the jury may determine from the evidence. (Given.)

433 10. The court instructs the jury that it is not the law of this state that a woman assaulted with an in-

tent to commit rape upon her is required to resist by all violent means within her power. The law requires only that she does not consent, and that she do all that her age, strength and the attendant circumstances make it reasonable for her to do in order to manifest her opposition. She is not required to resist beyond exhaustion of her strength or beyond the point where the force used against her would make further resistance useless or impossible. The question of resistance is a question for you to determine, and not a question the court can decide. (Given.)

434 11. The court instructs the jury that in this case it is unnecessary for the state to prove actual use of physical force by the defendant, if the evidence shows beyond a reasonable doubt that the prosecuting witness was paralyzed by fear or overcome by the superior strength of said defendant. (Given.)

435 12. The court further instructs the jury, that if you believe from the evidence beyond a reasonable doubt that the prosecuting witness in this case, Anna Nadine Templeman, made complaint to and told her mother and others of the assault alleged to have been made upon her, at the earliest opportunity, then the fact that she made such complaint and told of the assault is a circumstance which may be considered by you as tending to sustain the truth of her testimony on the trial that such an assault was made. (Given.)

436 13. The court instructs the jury, as a matter of law, that the defendant in this case has put in evidence his general reputation for truth and veracity and for being a law abiding person, and that such evidence is permissibile under the law, and is to be

by the jury considered as a circumstance in this case. But the court further instructs the jury that if from all the evidence in the case they are satisfied beyond a reasonable doubt of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact, if it be a fact, that heretofore the accused has borne a good reputation for truth and veracity and for being a law abiding person.

(Refused).

437 14. The court instructs the jury in the language of the statute that an assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another. (Given.)

438 15. The court instructs the jury that to constitute the offense charged in this case the intent alleged in the indictment is necessary to be shown. But such intent need not necessarily be proven by direct evidence. If the jury believe beyond a reasonable doubt that the intent charged in the indictment is shown by the facts and circumstances in evidence, that is sufficient. (Given.)

439 16. The court instructs the jury in view of the fact that intent involved is a mental state known only to the actor, the law requires only such proof of intent as the thing to be proven admits. Intent may be proven by the act alone, and a sane man is presumed to intend the natural and probable consequences of an act intentionally done.

440 17. The court instructs the jury that the intention of a person committing an act may be inferred from all the evidence in the case together with all the facts and circumstances surrounding the commission of such act. Every person is presumed by law to intend

the reasonable and probable consequence of his own deliberate act, unless some other or different intention is proven or appears from all the evidence in the case. (Given.)

441 18. The court instructs the jury that they are not bound to accept the testimony of the defendant in reference to criminal intent, but may consider all the facts and circumstances connected with the case. (Given.)

442 19. The court instructs the jury that circumstantial evidence in criminal cases is the proof of such facts and circumstances, connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged, and if the facts and circumstances shown by the evidence in this case are sufficient to satisfy the jury of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding such defendant guilty. The law demands a conviction whereever there is sufficient legal evidence to show the defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence. (Given.)

443 20. The court instructs the jury that you are not at liberty to disbelieve as jurors if from the evidence you believe as men and women. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. (Given.)

444 21. The court further instructs the jury that the term, "beyond all reasonable doubt," and the term, "to a moral certainty," are synonymous terms, that is, they mean the same thing when applied and used by the court in this or other instructions given to you as the law to govern you in arriving at your verdict in this case. (Given.)

445 22. The court instructs the jury, as a matter of law, that the rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the People the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty of crime to escape, but is a humane provision of the law, intended, so far as human agencies can, to prevent an innocent person from being convicted. (Given.)

446 23. The court instructs the jury as a matter of law that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequence of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. (*Given.*)

447 24. The court instructs you further that although the law is that before you can find the defendant guilty you must be convinced of his guilt from the evidence to a moral certainty, yet, if after considering all of the evidence in the case you have no reasonable doubt from the evidence of the guilt of the defendant in manner and form as charged in the indictment, then you are convinced of the guilt of such defendant to a moral certainty. (*Given.*)

448 25. The court instructs the jury that a doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial consideration of all the

evidence in the case, as is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause.

If, after considering all the evidence, you say you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt.

(*Given.*)

449 26. The court instructs the jury that if the defendant has been proven guilty beyond a reasonable doubt they should not acquit him merely because it was possible that he was innocent; and in this regard the court instructs the jury that the prosecution is not required to prove the guilt of this defendant beyond a possibility of a doubt. (*Given.*)

450 27. The court instructs the jury that neither by these instructions nor by any words uttered or remark made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury, that is to say, they should apply them to the facts as a whole, and not detach or separate any one instruction from any or either of the others. (*Given.*)

451 28. The court instructs the jury that before the defendant can avail himslf of the defense of an alibi, the proof must cover the whole time of the commission of the crime, so as to render it impossible, or highly improbable, that the defendant could have committed the act. (*Given.*)

452 29. The court further instructs the jury, that where an alibi is relied on as a defense, then in order to maintain it, it is incumbent on the defendant to support it by proof of such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against the defendant. (*Given.*)

453 30. The court instructs the jury in the language of the statute that it shall not be necessary to prove emission to convict any person of the crime of rape. (*Given.*)

454 31. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant, James Davis, on or about September 18, 1955, in the County of Winnebago and State of Illinois, was a male person of the age of fourteen years and upwards and that he did then and there have carnal knowledge of the said Anna Nadine Templeman, a female person, forcibly and against her will, as alleged and charged in the first count of the indictment, then you should find the defendant guilty of rape in manner and form as charged in the first count of the indictment. (*Given.*)

455 32. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant, James Davis, on or about September 18, 1955, in the County of Winnebago and State of Illinois, was a male person of the age of seventeen years and upwards, and that he did then and there have carnal knowledge of one Anna Nadine Templeman, then and there being a female person under the age of sixteen years and not then and there the wife of him, the said James Davis, all as alleged and charged in the second count of the indictment, then you should find the defendant guilty of rape in the manner and form as charged in the second count of the indictment. (Given.)

456 33. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant, James Davis, on or about September 18, 1955, in tht County of Winnebago and State of Illinois did unlawfully, forcibly and feloniously make an assault in and upon the said Anna Nadine Templeman, a female person, with the intent unlawfully, feloniously, forcibly and against her will to carnally know and ravish the said Anna Nadine Templeman, as alleged and charged in the third count of the indictment, then you should find the defendant guilty of assault with intent to commit rape, in manner and form as charged in the third count of the indictment. (Given.)

457 34. The court instructs the jury as to the form of your verdict as follows:

If you find the defendant guilty of rape in manner and form as charged in the first or second counts of the indictment, then the form of your verdict may be:

"We, the jury, find the defendant guilty of rape in manner and form as charged in the .....count

..... of the indictment (inserting the number of the count or counts on which you find him guilty), and we fix his punishment at imprisonment in the penitentiary for a term of ..... (inserting in the blank space any number of years not less than one, or for his natural life).

"We further find from the evidence that the defendant is now about the age of ..... years" (inserting his age).

If you find the defendant guilty of an assault with the intent to commit rape in manner and form as charged in the third count of the indictment, then the form of your verdict may be:

"We, the jury, find the defendant guilty of an assault with the intent to commit rape in the manner and form as charged in the third count of the indictment.

"We further find from the evidence that the defendant is now about the age of ..... years" (inserting his age).

If you find the defendant not guilty, then the form of your verdict may be:

"We, the jury, find the defendant not guilty."

458 And thereupon the defendant tendered the following instructions:

459 1. The court instructs the jury that the indictment in this case is not evidence of guilt and it should not be so considered by the jury, and no juror should permit himself to be influenced against the defendant because of the fact that an indictment has been returned against him nor because of the nature of the charge made in the indictment. (Given.)

460 2. The court instructs the jury that the defendant is entitled to the benefit of any reasonable doubt, and by a reasonable doubt is meant that unless you have a firm and abiding conviction to a moral certainty of the truth of the charge in the indictment, you should find the defendant not guilty. The benefit of a reasonable doubt is a substantial right of the defendant and it applies to the whole case.

(Given.)

461 3. The court instructs the jury that a reasonable doubt may be occasioned by a want of evidence, or it may be such a one as may arise from a careful and impartial consideration of the evidence, and one which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause.

(Given.)

462 4. The court instructs the jury that the plaintiff must prove by competent evidence every essential element of the offense charged in the indictment to the satisfaction of each and every juror beyond all reasonable doubt, and if it fails to do so, then you should find the defendant not guilty. (Given.)

463 5. The court instructs the jury that in all criminal cases the plaintiff is required to prove what is known in law as the corpus delicti, which in plain English, means that an offense has been committed. The plaintiff also must prove beyond all reasonable doubt that the offense was committed by the defendant, as charged in the indictment against him.

(Given.)

464 6. The court instructs the jury that the defendant has entered a plea of not guilty to the indictment. A plea of not guilty is a denial by him of each and every material allegation of the indictment. (Given.)

465 7. The court instructs the jury that the burden of proving beyond all reasonable doubt every material allegation necessary to establish the offense in the indictment, rests upon the plaintiff throughout the trial, and the burden of proof never shifts to the defendant. (Given.)

466 8. The court instructs the jury that one of the defenses in this case is what is known in law as an alibi, that is, that the defendant was at another place at the time that the alleged offense was committed and therefore could not have committed it. It is a proper and legal defense and all evidence bearing upon it should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to the guilt of the defendant, you should give the defendant the benefit of such doubt and find him not guilty. The defendant is not required to prove an alibi beyond all reasonable doubt, or even by a preponderance or greater weight of the evidence. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place the alleged offense was committed, if any such offense was committed. (Given.)

467 9. The court instructs the jury that the testimony of a deputy sheriff is not entitled to any more credit or consideration than any other credible witness, and you should take into consideration the testimony of each witness and give to the testimony of each witness such credit as you believe that the testimony of the witness is fairly entitled to receive at your hands. (Given.)

468 10. The court instructs the jury that admissions are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces, seldom remembered accurately, or repeated with due precision, and incapable in their nature of being disproved by negative evidence. (Refused)

469 11. The court instructs the jury that while admissions are competent to be given in evidence against a party who makes them, they are often of an inconclusive and unsatisfactory character, depending very much upon the circumstances under which they are made. It is the province of the jury to decide the weight to be given to admissions, and in doing so they have the right to take into consideration the circumstances under which they were made and the relation and condition of the parties to such admission, and the ability of witnesses to recollect such admissions as they were originally made. (Given).

470 12. The court instructs the jury that it has allowed you to hear evidence of statements made by the defendant in the nature of a confession of the offense charged in the indictment. Whether the confession is true or false or partly true and partly false is a question for you to determine. You should give it such credit and weight as you may believe, from the evidence, it is entitled to. (Given.)

471 13. The court instructs the jury that it is your duty to treat and consider any statement or confession made by the defendant and admitted in evidence precisely the same as any other testimony, and that if you believe the whole statement or confession to be voluntary and true, you should act upon the whole

as true, but if from the evidence you find any inherent improbability in it or if you find sufficient grounds from the evidence for so doing, you may accept any part of the statement or confession which from the evidence and all the circumstances in the case you believe to be false. (Given.)

472 14. The court instructs the jury that the defendant cannot be convicted upon his mere confession made out of court, uncorroborated by any fact and circumstances showing the truth of such confession. (Given.)

473 15. The court instructs the jury that you are not authorized to convict the defendant of the offense charged in the indictment if such conviction must depend upon the sole uncorroborated testimony of the prosecuting witness, if her testimony is denied by the defendant, unless her testimony is clear and convincing or is corroborated by facts and circumstances sufficient to prove the guilt of the defendant beyond all reasonable doubt. (Given.)

474 16. The court instructs the jury that a charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the prosecuting witness and the defendant usually are the only witnesses. Therefore, the law requires that you examine the testimony of the prosecuting witness with caution. (Given.)

475 17. The court instructs the jury that when a person who was not at the place where an offense was committed at the time of its commission is later charged with having been present and having com-

mitted such offense, his absence from the scene of the offense, if proved, is a complete defense which we call an alibi. The defendant has introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense, for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendant was present at the time the offense was committed, hen it is your duty to find the defendant not guilty.

(Refused.)

476 18. The court instructs the jury that the defendant is a competent witness in his own behalf, and you have no right to discredit his testimony from caprice, nor merely because he is the defendant. You are to treat him the same as any other witness, and subject him to the same tests, and only the same tests, as are legally applied to other witnesses, and while you have the right to take into consideration the interest he may have in the result of the case, you also have the right, and it is your duty, to take into consideration the fact, if such is the fact, that he has been corroborated by other credible evidence.

(Refused.)

477 19. The court instructs the jury that in determining the credibility of the defendant as a witness, though you may take into consideration the fact that he is interested in the result of the case, yet you should not refuse to consider his testimony merely because he is the defendant. The testimony of the defendant may be of even greater weight than the testimony of all the other witnesses put together, if the jury consider it entitled to such weight, even where he is contradicted by other witnesses in material parts

of his testimony and corroborated by none. And in this case you should give the defendant the benefit of any reasonable doubt of guilt, if any such you have, whether such doubt arises from the testimony of the defendant or from any other evidence in the case when all the evidence is considered together.

478 20. The court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged in the indictment, if any such offense was committed, you must consider all the testimony in the case, both that for the plaintiff and that for the defendant, considering the means of identification, the circumstances under which he was identified, the opportunity for identifying the defendant, the influence brought to bear on persons claiming to identify the defendant, if any such appears from the evidence, the description of his appearance as stated by the witnesses, and the probabilities or improbabilities that it was the defendant, and if, after so judging and weighing the testimony you are not satisfied beyond all reasonable doubt and to a moral certainty that the defendant has been correctly identified as the person who committed the offense charged in the indictment, if any such offense was committed, then it will be your duty to find the defendant not guilty. (Given.)

479 21. The court instructs the jury that the law does not require of the defendant that he prove himself innocent. It is incumbent upon the plaintiff to prove from the evidence, and the facts and circumstances in evidence, beyond all reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment, or some count thereof, and unless the plaintiff has done so, then you should find the defendant not guilty. (Given.)

480 22. The court instructs the jury that the burden of proof is upon the plaintiff in this case to prove the guilt of the defendant beyond all reasonable doubt, and all presumptions of law, independent of the evidence, are in favor of the innocence of the defendant. The law presumes every defendant who has been charged with an offense to be innocent until he has been proven guilty beyond all reasonable doubt, and in this case, if, after you have consid red all of the evidence in the case, you then have a reasonable doubt as to the guilt of the defendant, then the defendant is entitled to the benefit of that doubt, and you should find the defendant not guilty. (Refused.)

481 23. The court instructs the jury that it is incumbent upon the plaintiff to prove the guilt of the defendant beyond all reasonable doubt. Nothing is to be presumed or taken by implication against the defendant. The law presumes a man innocent of the offense with which he is charged until he is proven guilty beyond all reasonable doubt by competent evidence. The defendant is not called upon to prove his innocence nor are you required to believe him innocent in order to find him not guilty. If the evidence leaves in your mind a reasonable doubt of the guilt of the defendant, then you should find the defendant not guilty. (Refused.)

482 24. The court instructs the jury that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the preponderance or greater weight of the evidence supports the allegations of the indictment, nor is it sufficient upon the doctrine of chances that it is more probable that the defendant is guilty than innocent. If there is any reasonable theory consistent with the evidence when all the evi-

dence in the case is considered together, upon which there can be any reasonable doubt in your minds as to the guilt of the defendant, then it is your duty to give the defendant the benefit of such doubt and you should find the defendant not guilty. (Given.)

483 25. The court instructs the jury that if, after having heard all of the evidence in this case, there are two theories which may be reasonably drawn from the evidence, upon the first of which theories the defendant would be guilty, and upon the second of which theories the defendant would be innocent, then, in that event, it will become the duty of the jury to adopt that theory consistent with the innocence of the defendant and find him not guilty. (Given.)

484 26. The court instructs the jury that a verdict of not guilty in this case means no more than this, that the guilt of the defendant has not been demonstrated in the precise, specific and narrow form prescribed by law. The evidence, to convict the defendant, must not merely be beyond all reasonable doubt consistent with the hypothesis of his guilt, but it also must be beyond all reasonable doubt inconsistent with any hypothesis of innocence that can reasonably be drawn therefrom, and so, in this case, if, after a full and fair consideration of the evidence, you can reasonably draw therefrom any theory whatsoever consistent with the innocence of the defendant, then it is your duty to find the defendant not guilty.

(Given.)

485 27. The court instructs the jury that the defendant is by law presumed to be innocent of the offense charged in the indictment and this presumption may

not be disregarded by you for it is a substantial part of the law of the land. This presumption of innocence attaches to the defendant and is in his favor as soon as he is placed upon trial and goes with him through all of the trial and into the jury room with you as you deliberate what the verdict shall be. It is of itself sufficient to acquit the defendant, unless and until it has been overcome by evidence which convinces you beyond all reasonable doubt and to a moral certainty of the guilt of the defendant of the charge made against him in the indictment, and in determining the guilt or innocence of the defendant you should always have in mind this presumption of innocence. After you have carefully considered all of the evidence, including this presumption, then unless you can say upon your oaths as jurors that you are satisfied beyond all reasonable doubt and to a moral certainty of the guilt of the defendant, it is your duty to find the defendant not guilty.

(Given.)

486 Which were all the instructions given or refused on the trial of said cause.

487 Motion for New Trial, filed March 1, 1956, as follows:

Now comes James Davis, defendant, and moves the court to set aside the verdict of the jury as to the first and second counts of the indictment, and to grant a new trial, for the following reasons:

1. The court erred in denying the application of the defendant for a change of venue.

2. The court was without jurisdiction to conduct the trial.

3. The subsequent proceedings before the court were unauthorized.

4. The defendant was denied a fair trial by an impartial jury.

5. The court erred in denying the motion for a directed verdict as to the first count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

488 6. The court erred in denying the motion for a directed verdict as to the second count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

7. The court erred in denying the motion for a directed verdict as to the third count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

8. The court erred in denying the motion for a directed verdict as to the first count of the indictment at the close of all the evidence, and in refusing to give to the jury the instruction tendered with said motion.

9. The court erred in denying the motion for a directed verdict as to the second count of the indictment at the close of all the evidence, and in refusing to give to the jury the instruction tendered with said motion.

489 10. The court erred in denying the motion for a directed verdict as to the third count of the indictment at the close of all the evidence, and in refusing to give to the jury the instruction tendered with said motion.

11. The court erred in denying the motion to compel an election between counts.

12. The court erred in admitting improper, irrelevant and incompetent evidence offered by the plaintiff over the objection of the defendant.

13. The court erred in admitting in evidence the purported complaint of the prosecuting witness offered by the plaintiff over the objection of the defendant.

14. The court erred in admitting hearsay evidence offered by the plaintiff over the objection of the defendant.

15. The court erred in admitting opinion evidence offered by the plaintiff over the objection of the defendant.

16. The court erred in admitting in evidence the purported statement of the defendant without the necessary preliminary proof.

17. The court erred in refusing to strike out improper, irrelevant and incompetent evidence offered by the plaintiff over the objection of the defendant.

18. The court erred in permitting the State's Attorney to read plaintiff's exhibit 1 to the jury.

490 19. The court erred in limiting cross examination of the witnesses for the plaintiff.

20. The court erred in refusing to admit proper, relevant and competent evidence offered by the defendant.

21. The court erred in admitting improper, irrelevant and incompetent evidence in rebuttal offered by the plaintiff over the objection of the defendant.

22. The testimony of the prosecuting witness is not clear and convincing.

23. There is no proof of the identity of the defendant.

24. The evidence failed to prove the guilt of the defendant beyond all reasonable doubt and to a moral certainty.

25. The court erred in making prejudicial remarks and comments in the presence of the jury.

26. The court erred in admonishing and censuring counsel for the defendant.

27. The court erred in permitting improper argument by the State's Attorney and his Assistant.

28. The State's Attorney and his Assistant used language tending to inflame and excite the minds of the jury against the defendant.

491 29. The State's Attorney and his Assistant used language tending to coerce the jury into a verdict of guilty.

30. The State's Attorney in his closing argument introduced new issues.

31. The court erred in refusing to confine the State's Attorney to a strict reply to the argument of counsel for the defendant.

32. The court erred in giving to the jury oral instructions during the trial.

33. The court erred in giving to the jury each and every instruction tendered by the plaintiff over the objections of the defendant.

34. The court erred in giving to the jury improper instructions and particularly Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33 and 34 tendered by the plaintiff over the objections of the defendant.

35. The court erred in giving to the jury the instruction relative to the form of verdict tendered by the plaintiff over the objection of the defendant.

36. The number of instructions tendered by the plaintiff was unreasonable.

37. The court erred in refusing to give to the jury proper instructions tendered by the defendant.

492 38. The verdict is contrary to the law.

39. The verdict is contrary to the evidence.

40. The verdict is contrary to the law and the evidence.

41. The verdict is clearly and palpably against the manifest weight of the evidence.

42. The verdict is the result of the passion, bias and prejudice of the jury against the defendant.

43. The jury failed to return a separate verdict as to each count of the indictment.

44. The verdict is inconsistent.

45. The verdict of guilty of rape in manner and form as charged in the first and second counts of the indictment is inconsistent with the implied acquittal as to the third count of the indictment.

46. The verdict is invalid.

47. The jury fixed the punishment under two counts of the indictment.

48. The verdict is so defective that judgment cannot legally be entered thereon.

49. The punishment fixed by the jury is excessive.

50. The court erred in revoking the bond of the defendant and in committing him to the County Jail after the verdict was returned in open court.

The court on March 15, 1956, denied said motion.

493 Motion in Arrest of Judgment, filed March 15, 1956, as follows:

Now comes James Davis, defendant, and moves the court in arrest of judgment for the following reasons:

1. The indictment does not allege facts sufficient to constitute a criminal offense.

2. The indictment charges separate and distinct offenses.

3. The offenses charged in the indictment are subject to different penalties.

4. The court erred in denying the motion to compel an election between counts.

5. The jury failed to return a separate verdict as to each count of the indictment.

6. The verdict is inconsistent.

7. The verdict of guilty of rape in manner and form as charged in the first and second counts of the indictment is inconsistent with the implied acquittal as to the third count of the indictment.

8. The verdict is invalid.

9. The jury fixed the punishment under two counts of the indictment.

10. The verdict is so defective that judgment cannot be legally entered thereon.

The court on March 15, 1956, denied said motion.

495 Certificate of Judge.

496 Praecipe for Record, filed April 24, 1956.

497 Certificate of Clerk.

ASSIGNMENT OF ERRORS.

Now comes James Davis, Plaintiff in Error, hereinafter called Defendant, and shows to the court that in the record and proceedings of the Circuit Court of Winnebago County, and in the rendition of the judgment, there is manifest error to his injury, as follows:

1. The court erred in denying the motion to quash the indictment.

2. The court erred in denying the application of the defendant for a change of venue.

3. The court was without jurisdiction to conduct the trial.

4. The subsequent proceedings before the court were unauthorized.

5. The defendant was denied a fair trial by an impartial jury.

6. The court erred in denying the motion for a directed verdict as to the first count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

7. The court erred in denying the motion for a directed verdict as to the second count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

8. The court erred in denying the motion for a directed verdict as to the third count of the indictment at the close of the plaintiff's case, and in refusing to give to the jury the instruction tendered with said motion.

9. The court erred in denying the motion for a directed verdict as to the first count of the indictment at the close of all the evidence, and in refusing to give to the jury the instruction tendered with said motion.

11. The court erred in denying the motion for a directed verdict as to the third count of the indictment at the close of all the evidence, and in refusing to give to the jury the instruction tendered with said motion.

12. The court erred in denying the motion to compel an election between counts.

13. The court erred in admitting improper, irrelevant and incompetent evidence offered by the plaintiff over the objection of the defendant.

14. The court erred in admitting in evidence the purported complaint of the prosecuting witness offered by the plaintiff over the objection of the defendant.

15. The court erred in admitting hearsay evidence offered by the plaintiff over the objection of the defendant.

16. The court erred in admitting opinion evidence offered by the plaintiff over the objection of the defendant.

17. The court erred in admitting in evidence the purported statement of the defendant without the necessary preliminary proof.

18. The court erred in refusing to strike out improper, irrelevant and incompetent evidence offered by the plaintiff over the objection of the defendant.

19. The court erred in permitting the State's Attorney to read plaintiff's exhibit 1 to the jury.

20. The court erred in limiting cross examination of the witnesses for the plaintiff.

21. The court erred in refusing to admit proper, relevant and competent evidence offered by the defendant.

22. The court erred in admitting improper, irrelevant and incompetent evidence in rebuttal offered by the plaintiff over the objection of the defendant.

23. The testimony of the prosecuting witness is not clear and convincing.

24. There is no proof of the identity of the defendant.

25. The evidence failed to prove the guilt of the defendant beyond all reasonable doubt and to a moral certainty.

26. The court erred in making prejudicial remarks and comments in the presence of the jury.

27. The court erred in admonishing and censuring counsel for the defendant.

28. The court erred in permitting improper argument by the State's Attorney and his Assistant.

29. The State's Attorney and his Assistant used language tending to inflame and excite the minds of the jury against the defendant.

30. The State's Attorney and his Assistant used language tending to coerce the jury into a verdict of guilty.

31. The State's Attorney in his closing argument introduced new issues.

32. The court erred in refusing to confine the State's Attorney to a strict reply to the argument of counsel for the defendant.

33. The court erred in giving to the jury oral instructions during the trial.

34. The court erred in giving to the jury each and every instruction tendered by the plaintiff over the objections of the defendant.

35. The court erred in giving to the jury improper instructions and particularly Instructions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33 and 34 tendered by the plaintiff over the objections of the defendant.

36. The court erred in giving to the jury the instruction relative to the form of verdict tendered by the plaintiff over the objection of the defendant.

37. The number of instructions tendered by the plaintiff was unreasonable.

38. The court erred in refusing to give to the jury proper instructions tendered by the defendant.

39. The verdict is contrary to the law.

40. The verdict is contrary to the evidence.

41. The verdict is contrary to the law and the evidence.

42. The verdict is clearly and palpably against the manifest weight of the evidence.

43. The verdict is the result of the passion, bias and prejudice of the jury against the defendant.

44. The jury failed to return a separate verdict as to each count of the indictment.

45. The verdict is inconsistent.

46. The verdict of guilty of rape in manner and form as charged in the first and second counts of the indictment is inconsistent with the implied acquittal as to the third count of the indictment.

47. The verdict is invalid.

48. The jury fixed the punishment under two counts of the indictment.

49. The verdict is so defective that judgment cannot legally be entered thereon.

50. The punishment by the jury is excessive.

51. The court erred in revoking the recognizance of the defendant and in remanding him to the custody of the Sheriff after the verdict was returned into open court.

52. The court erred in denying the motion for new trial.

53. The court erred in denying the motion in arrest of judgment.

54. The court erred in entering judgment of conviction on the verdict of the jury.

55. The court erred in imposing sentence.

56. The judgment and sentence are void.

Respectfully submitted,

JOHN R. SNIVELY,
Attorney for Plaintiff in Error.

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1091~~ 193

JAMES DAVIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ of Certiorari To The Supreme Court of Illinois.

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INDEX.

	PAGE
Citation to Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	27
Appendix A, Statute	29
B, Opinion	31

CITATIONS.

Cases:

Cantwell v. People, 138 Ill. 602	8
Cunningham v. People, 210 Ill. 410	9, 24
Draper v. Draper, 68 Ill. 17	10
Earll v. People, 99 Ill. 123	22
Fikes v. Alabama, 352 U.S.	15
Gore v. People, 162 Ill. 259	18
Haley v. Ohio, 332 U.S. 596	15

Hoch v. People, 249 Ill. 265 10
Kelly v. People, 29 Ill. 287 10
Kevern v. People, 224 Ill. 170 24
McNabb v. United States, 318 U.S. 332 15
May v. People, 92 Ill. 343 18
Miller v. People, 39 Ill. 457 13
O'Donnell v. People, 110 Ill. App. 250 22
People v. Albers, 360 Ill. 73 12
People v. Ambach, 247 Ill. 451 24
People v. Arcabascio, 395 Ill. 487 24
People v. Arendarczyk, 367 Ill. 534 12
People v. Bishop, 359 Ill. 112 12
People v. Black, 317 Ill. 603 22
People v. Braidman, 323 Ill. 37 24
People v. Carruthers, 379 Ill. 388 21
People v. Cohen, 268 Ill. 416 8
People v. Cope, 345 Ill. 278 12
People v. Davidson, 240 Ill. 191 19
People v. DeMarios, 401 Ill. 146 24
People v. Dieckman, 404 Ill. 161 7
People v. Eccarius, 305 Ill. 62 16
People v. Enright, 256 Ill. 221 10
People v. Flynn, 378 Ill. 351 24
People v. Fox, 319 Ill. 606 12
People v. Freeman, 244 Ill. 590 17

People v. Frugali, 334 Ill. 324 25
People v. Heide, 302 Ill. 624 13
People v. Holick, 337 Ill. 333 12
People v. Johnson, 298 Ill. 52 10
People v. Karpovich, 288 Ill. 268 10
People v. Kazmierczyk, 357 Ill. 592 17
People v. Lacey, 339 Ill. 480 25
People v. McWilliams, 350 Ill. 628 7
People v. Maria, 359 Ill. 231 23
People v. Meyers, 381 Ill. 156 16
People v. Reno, 324 Ill. 484 25
People v. Rogers, 415 Ill. 343 19
People v. Rosenbaum, 299 Ill. 93 8
People v. Sassano, 323 Ill. 182 26
People v. Schladweiler, 315 Ill. 553 25
People v. Scott, 320 Ill. 327 7
People v. Scott, 401 Ill. 80 24
People v. Scott, 407 Ill. 301 17
People v. Serrielle, 354 Ill. 182 17
People v. Shiffman, 350 Ill. 243 7
People v. Silva, 405 Ill. 158 21
People v. Terracco, 346 Ill. 423 25
People v. Thomlinson, 400 Ill. 555 15
People v. Weitzman, 362 Ill. 11 23
People v. Wells, 380 Ill. 347 24
People v. Williams, 414 Ill. 414 21
People v. Wilson, 401 Ill. 68 19

Perin v. Parker, 126 Ill. 201 8
Robinson v. People, 159 Ill. 115 13
Seaverns v. Lischinski, 181 Ill. 356 18
Shannon v. Shannon, 208 Ill. 52 10
Sokel v. People, 212 Ill. 238 10
Stephenson v. State, 28 Ind. 272 18
Stevens v. People, 158 Ill. 111 9
Williams v. People, 101 Ill. 382 18
Wistrand v. People, 213 Ill. 72 ..... 18, 19

Statute:

Ill. Rev. Stat. 1955, Chap. 146, Secs. 18, 20, 21, 23, 24, 25 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

JAMES DAVIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ of Certiorari To The Supreme Court of Illinois.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, James Davis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on January 24, 1957, which affirmed the judgment of conviction of the Circuit Court of Winnebago County of the crime of rape and sentence to the penitentiary for a term of 15 years.

Citation to Opinion Below.

The opinion of the Supreme Court of Illinois, printed in Appendix B hereto, infra, page 31, is reported in 10 Ill. 2d 430, 140 N.E. 2d 675.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on January 24, 1957. A timely petition for rehearing filed on February 8, 1957, was denied on March 19, 1957. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3) because a right was specially set up and claimed under the Constitution of the United States.

The federal question sought to be reviewed was raised in the motion for new trial in the court of first instance and in the assignments of errors and argument, and the petition for rehearing, in the appellate court. The question including every subsidiary question fairly comprised therein was overruled and it was held that petitioner had a fair trial.

Question Presented.

Whether the state deprived petitioner of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States because he did not have a fair trial.

Statute Involved.

The statutory provisions involved are Sections 18, 20, 21, 23, 24 and 25 of Chapter 146 of the Illinois Revised Statutes, 1955. They are printed in Appendix A, infra, page 29.

Statement of the Case.

This was a criminal prosecution.

Petitioner was indicted on January 9, 1956, in the Circuit Court of Winnebago County, for the crimes of forcible rape, statutory rape, and assault with intent to commit rape of a 14 year old girl on September 18, 1955.

He was arraigned on January 11, 1956, and furnished with a copy of the indictment, consisting of three counts, and a list of the jurors and witnesses. A motion to quash the indictment was heard and denied. He then entered a plea of not guilty. The case was set for trial on February 13, 1956. The required bail of $3,500 was furnished.

The case, however, was not reached on the trial list on the date set. On February 14, 1956, he filed a petition for change of venue. It alleged that he feared that he would not receive a fair and impartial trial if the cause was tried before the Honorable Albert S. O'Sullivan, or the Honorable William R. Dusher, two of the judges of said court, because said judges were prejudiced against him, so that he could not expect a fair trial by said judges. It also alleged that the cause for a change of venue arose and came to his knowledge theretofore and again on February 13, 1956. It was verified by his affidavit.

Notice was given to the State's Attorney before the petition was filed. He also was furnished with a copy of the petition.

Application was made to Judge Dusher but he was not able to consider it at that time. He set it for February 15, 1956, at 9:30 A.M., but he then assigned it to Judge O'Sullivan who it had been learned was scheduled to hear the case when it was reached on the trial list.

Petitioner appeared in person and by his attorney before Judge O'Sullivan at the time set. This was the first time that he had been before Judge O'Sullivan in this case.

The petition was presented to Judge O'Sullivan. It was considered by him. He said that he knew nothing about the case or the parties, but he was then advised that he had heard a case against petitioner several years ago. In it the jury disagreed. An application for a change of venue from both Judge O'Sullivan and Judge Dusher was granted at that time.

His attorney then remarked:

> "I understand your Honor is going to be here next month; Judge Dusher is not going to be here. I would say this, if the court would remove the case from the trial list at the present time and not pass on the petition, it could then be set for trial before you next month. I understand there is to be a jury."

Judge O'Sullivan, however, made no comment or remarks relative thereto, but he denied the petition because it was not filed in time. He then set the case for trial at 1:30 P.M.

Prior to the selection of the jury and the commencement of the trial, petitioner renewed his application for a change of venue. He then asked leave to file an affidavit.

It alleged that he believed that the Honorable Albert S. O'Sullivan and the Honorable William R. Dusher, two of the judges of said court, were so prejudiced against him that he could not have a fair and impartial trial by said judges. Leave to file the affidavit was denied.

The case was tried by a jury. Evidence was introduced by the People in support of the allegations of the indictment, including a purported statement of petitioner. Objection was made to the statement because it was involuntary, but it was admitted and read to the jury. The prosecuting witness, her mother and a sister testified relative to the identity of the person who committed the crime. Petitioner introduced evidence relative to his innocence of the crime. His defense of alibi was corroborated by three witnesses.

Motions for a directed verdict at the close of the People's case and all the evidence were denied.

A motion to compel an election between the counts of the indictment was reversed.

In his argument to the jury the State's Attorney used language tending to inflame and excite the minds of the jury against petitioner. He also used language tending to coerce the jury into a verdict of guilty.

Erroneous instructions tendered by the People, particularly Instructions Nos. 6, 19 and 28, were given to the jury.

In a single verdict the jury found petitioner guilty of rape in manner and form as charged in the first and second counts of the indictment and fixed his punishment at imprisonment in the penitentiary for a term of 15 years. No verdict, however, was returned as to the third count.

Motions for a new trial and in arrest of judgment were denied.

Petitioner, on March 15, 1956, was sentenced to the Illinois State Penitentiary. Mittimus, however, was stayed.

Petitioner then sued out a writ of error from the Supreme Court of Illinois to review the judgment of conviction and sentence. The writ of error was made a supersedeas and a bond of $10,000 was filed.

The judgment of the Supreme Court of Illinois was entered on January 24, 1957. A petition for rehearing was denied on March 19, 1957. On the following day the March term of court was adjourned. The mandate was issued on March 22, 1957.

A motion for stay of execution was filed on March 29, 1957, and an amended motion on April 3, 1957. It was sought in the amended motion to stay the execution of the judgment and the issuance of the mandate, and to recall the mandate theretofore issued, and to be admitted to bail. The amended motion was denied by the Honorable Charles H. Davis, a Judge of the court in vacation, because it was believed that the jurisdiction of the court ceased at the close of the term.

A motion to vacate the order entered on April 3, 1957, and for other relief was filed on May 2, 1957. It was denied by the court on May 14, 1957.

Reasons for Granting the Writ.

1. The refusal to grant a change of venue deprived petitioner of his Constitutional right to a fair and impartial trial.

In all criminal prosecutions, an accused has the right to a fair and impartial trial. To secure such right, he is entitled to make application for a change of venue.

The petition was filed in apt time. It was in form and in substance in compliance with the statute. It was verified by the affidavit of petitioner, but it was not accompanied by a separate affidavit stating that he believed that the two judges were so prejudiced against him that he could not have a fair and impartial trial by them.

The provisions of the statute which authorizes a change of venue upon conditions prescribed should receive a liberal, and not a strict construction. Such statute should be construed to promote, rather than defeat, the right to a change of venue, especially where the prejudice of the judge is alleged. (*People* v. *McWilliams*, 350 Ill. 628, *People* v. *Scott*, 320 Ill. 327.)

Inasmuch as the petition was verified by the affidavit of petitioner, an accompanying affidavit was not required. It would add nothing to that which was already set forth in the petition. If the cause, however, was the prejudice of the judges against the attorney representing him, then the accompanying affidavit of the attorney is required. If it was believed that the accompanying affidavit was required, the trial court should have given petitioner leave to file the affidavit. It was reversible error to deny the motion. (*People* v. *Dieckman*, 404 Ill. 161, *People* v. *Shiffman*, 350 Ill. 243.)

The application was made in good faith. Although the court below believed that the petition was filed for delay, this was not the reason that it was filed. Petitioner made the application because of the prejudice of the judges. The allegation was not made without foundation. An examination of the record clearly discloses the prejudice.

In addition, the alleged prejudice of the trial judge was not waived. Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and they do not presume acquiescence in the loss of fundamental rights. To constitute a waiver there must be an intentional relinquishment of a legal right. (*Perin* v. *Parker*, 126 Ill. 201.) Petitioner had no intention to waive the alleged prejudice and he did not waive it because he renewed his application for a change of venue. It is a complete answer to the conclusion of the court below that the alleged prejudice was waived.

The right to a change of venue because of the prejudice of the judge or any two of them on compliance with the statute is absolute. It was the duty of the trial court to grant the change of venue. The denial constituted reversible error. (*People* v. *Rosenbaum*, 299 Ill. 93, *People* v. *Cohen*, 268 Ill. 416, *Cantwell* v. *People*, 138 Ill. 602.)

The trial court was without jurisdiction to conduct the trial. The subsequent proceedings before it were unauthorized. Petitioner did not have a fair and impartial trial. He was deprived of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

2. The purported complaint of the prosecuting witness to her mother was not admissible.

The prosecuting witness did not testify that she made complaint to anyone. Her mother, however, was asked to relate what her daughter told her on September 18, 1955. Objection was made by petitioner, but the trial court permitted her to answer. She then related the conversation that she had with her daughter. The details of the alleged rape were related. She was permitted to testify that her daughter told her that she had been attacked. She then testified that her daughter said, "Mother, he did it to me."

It is proper to ask on cross examination whether the prosecuting witness made a complaint, and to receive in answer a simple yes or no. (*Stevens* v. *People*, 158 Ill. 111.) Her mother, however, was not asked whether her daughter had made complaint to her. In order to obtain the details that she related, she had asked her questions. A statement made, however, in response to questions is not admissible. (*Cunningham* v. *People*, 210 Ill. 410.)

Clearly, her testimony was hearsay evidence. It was incompetent. The trial court should have excluded all her testimony relative to the conversation that she had with her daughter, but it refused to do so.

The admission of such evidence was reversible error. It also constituted a denial of due process of law.

3. The sister of the prosecuting witness was not competent to testify.

At common law, in order to be a competent witness, a child must understand the nature and obligation of an oath or affirmation, and also the effect thereof. So it is said that the presumption that a child of tender years is not competent to testify may be rebutted by the disclosure of his knowledge of the nature and obligation of an oath

and of the moral and legal consequences resulting from its violation. If a child understands the nature and obligation of the oath, it is sufficient.

A witness who has reached the age of 14 years is presumed competent. If below that age the competency to testify is to be determined by a preliminary inquiry to advise the trial court, the requirement of competency being not one of age, but one of intelligence, ability to understand the meaning of an oath, and the moral obligations to speak the truth. (*Shannor* v. *Shannon*, 208 Ill. 52.) The question of competency is for the trial court to determine in the exercise of its sound discretion, (*People* v. *Enright*, 256 Ill. 221, *Hoch* v. *People*, 219 Ill. 265, *Kelly* v. *People*, 29 Ill. 287), and not for the jury.

The competency of a child to testify depends upon his or her intelligence, understanding and moral sense. (*Draper* v. *Draper*, 68 Ill. 17.) If the preliminary inquiry shows that the child does not understand the nature and obligation of an oath and is not of sufficient understanding to comprehend the thing about which she is called to testify, it is error to admit her testimony. (*People* v. *Johnson*, 298 Ill. 52, *People* v. *Karporich*, 288 Ill. 268, *Sokel* v. *People*, 212 Ill. 238.)

In the instant case, Darla Templeman, a sister of the prosecuting witness, was called as a witness by the People. She was only nine years old at the time of the alleged crime. Objection was made by petitioner to any testimony by her.

The preliminary inquiry by the trial court showed that such witness answered that she knew what it was to tell the truth, but she didn't know what would happen if she told a lie, although she was asked twice relative thereto,

that she attended Sunday School, and that it was bad if you tell something that is not the truth. It failed, however, to show that she understood the nature and obligation of an oath, or was of sufficient intelligence and understanding to testify. Although the court below observed that the intelligence of the witness was ascertained, to some extent, by her appearance and conduct in the presence of the trial court, the record fails to disclose any basis for this observation.

From a review of the preliminary inquiry and her testimony before the jury, it is clear that the trial court erred in permitting her to testify. The preliminary inquiry was not sufficient to establish her competency. It appears that her imagination overcame such intelligence and understanding as she had. She claimed that she saw a person hand a flashlight through the window to her sister who was in bed. She then claimed that she saw someone come into the house, but that she wasn't awake when the person walked into the bedroom. And lastly, she claimed that she saw the man when her sister held a flashlight in his face and that petitioner was the same man, but her sister failed to so testify. Although she was in the same bedroom, it is indeed strange that she did not relate anything about the alleged crime. Her testimony appears to have been highly colored by imagination and the natural tendency of a child to exaggerate. It seems certain that she was easily influenced by others who were interested in the case. She was not competent to testify. Her testimony was highly prejudicial to petitioner. It was a manifest abuse of discretion for the trial court to permit her to testify. Petitioner was denied due process of law.

4. The methods used to obtain the statement of petitioner were in violation of his Constitutional rights.

A statement or confession to be admissible in evidence must be voluntarily made. The question whether an alleged statement or confession was voluntarily made is essentially one for the trial judge, (*People* v. *Albers*, 360 Ill. 73, *People* v. *Fox*, 319 Ill. 606), and certain standards have been developed to guide him in reaching his decision. Where it is claimed that a statement or confession was not voluntarily made, the burden of proof is upon the People to show that it was obtained without the use of violence, threats, duress, coercion, intimidation or promises. (*People* v. *Holick*, 337 Ill. 333.) Under the usual procedure, the People, at a hearing out of the presence of the jury, must first establish a prima facie case by producing evidence that the statement or confession was voluntarily made. The burden of producing evidence then shifts to the defendant and the People may subsequently bring in evidence in rebuttal. (*People* v. *Bishop*, 359 Ill. 112.) Where the defendant has produced credible evidence tending to show that the statement or confession was the result of duress or coercion, the People, to rebut, must call for examination, if practicable, all persons present when the statement or confession was made so that the trial court may have all the facts surrounding the making of the statement or confession. (*People* v. *Arendarczyk*, 367 Ill. 534, *People* v. *Cope*, 345 Ill. 278.) These rules must be jealously guarded and strictly enforced because statements or confessions are sometimes extorted by brutal and ingenious means.

A statement or confession is not voluntarily made where any degree of influence amounting to duress is exerted by anyone having authority over the charge

against the accused or over his person tending to cause duress or hope of lenjency, for the law presumes that such statement or confession was prompted by that influence. A statement or confession so obtained must be excluded because the law cannot measure the force of the influence used or decide upon its effect upon the mind of the person. (*People* v. *Heide*, 302 Ill. 624, *Robinson* v. *People*, 159 Ill. 115, *Miller* v. *People*, 39 Ill. 457.)

In the instant case, a preliminary hearing was held before the trial court out of the presence of the jury. The People called Joe Ferona and Mike Iasparro, deputy sheriffs, who obtained the purported statement. Robert L. McDonald, an Assistant State's Attorney, who Ferona testified was present, was not called as a witness or his absence satisfactorily explained which was indeed strange. Petitioner testified.

The record discloses that in response to a telephone call from Hazel Templeman on September 18, 1955, such deputy sheriffs made an investigation of an alleged rape of her daughter, Anna Nadine Templeman. They talked with Mrs. Templeman and the other witnesses. In addition, they inspected the house where they lived.

On October 14, 1955, petitioner was taken into custody by such deputy sheriffs at the home of his sister. He was ready to eat supper. In response to a request, he went outside with them. He was sitting in the squad car talking with them at the time Elwyn Dorris, his brother-in-law, departed for his work. They then took him to the Templeman home which was several miles away to have them identify them. No other suspected persons accompanied them. They remained there 15 to 20 minutes talking with him. Leaving there, they took him to a factory. It was claimed that he was identified there by Erwin Leroy Pollitt. They then took him to the south side to investigate a

fire, but it was out when they arrived. He was finally taken to the Court House. While they drove around the city, they interrogated him. He said Ferona acted mysterious to him. He thought that Ferona was going to beat him up. Iasparro, however, calmed Ferona down.

It was 7:30 in the evening when they arrived at the Court House. He was questioned there by Ferona and Iasparro for a half hour. No members of his family were present. He was not represented by counsel. He asked for a lawyer, but he was denied one. Ferona said he wouldn't let him have a lawyer. He didn't advise petitioner that he didn't have to say a word because he wanted a statement from him. They didn't tell him that if he made a statement, it could be used against him in court. He was nervous, scared and hungry.

Ferona made a statement from a report that he had. He made it out. Petitioner did not know a thing about it. They promised him that if he would sign the statement he could go home and eat. He was not able to read or write. He wouldn't sign the statement but Ferona persisted. He then threatened to send the Sheriff into the room. He finally signed the statement but he couldn't understand it. He didn't know why he signed it. He was then taken to the County Jail. No warrant was served upon him.

He was taken to the State's Attorney's office on the following Monday. Ferona and Iasparro, however, were not with him. An Assistant State's Attorney showed him the statement. He was asked if it were true and he replied, No.

At the trial he moved to suppress the statement. His objections, however, were overruled. The statement was admitted in evidence and read to the jury.

There was not a sufficient showing made at the preliminary hearing as to the admissibility of the statement. The trial court should scrutinize with the utmost care the facts concerning a purported statement or confession to police officers and not deem itself bound by their testimony alone without taking into consideration all of the facts and circumstances surrounding it. (*People* v. *Thomlinson*, 400 Ill. 555.) The purported statement should have been supported by all persons present who heard or participated in the questioning. The People failed to sustain the burden of proof.

It is clear that the statement was not voluntarily made. It was obtained by secret, persistent and continued interrogation. Petitioner had little education. He was weak of will and mind. Ferona was determined to get a statement. "He wanted it," he said. In order to obtain it he completely disregarded the Constitutional rights of petitioner. Although there was no physical brutality, the statement was coerced. It was involuntary. (*Fikes* v. *Alabama*, 352 U.S. ....., *Haley* v. *Ohio*, 332 U.S. 596, *McNabb* v. *United States*, 318 U.S. 332.) The trial court should have excluded it from the jury. The use of the statement constituted a denial of due process of law.

5. The testimony of Erwin Leroy Pollitt in rebuttal was not admissible.

The People called Erwin Leroy Pollitt as a witness in rebuttal. Objection was made by petitioner, but it was overruled.

He claimed that he identified petitioner as the person he had seen peering through a window in the Templeman home on September 25, 1955, at 4:20 in the morning.

His testimony was not material to the issue. It was too remote. It was highly prejudicial to petitioner.

The trial court erred in the admission of such evidence. It also constituted a denial of due process of law.

6. There was no evidence to show force or resistance.

In order to prove the charge of forcible rape, there must be evidence to show that the act was committed by force and against the will of the female. If she has the use of her faculties and physical powers the evidence must show such resistance as will demonstrate that the act was against her will. (*People* v. *Meyers*, 381 Ill. 156, *People* v. *Eccarius*, 305 Ill. 62.) It is incumbent upon the People to prove such resistance beyond a reasonable doubt. It also is fundamental that voluntary submission by the female, while she has the power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape. It is not contended that the prosecuting witness did not have full and complete use of her faculties, and her physical powers do not appear to have been impaired. The evidence militates against any claim that she might have been overcome or paralyzed by fear. The rule that proof of physical force in rape is unnecessary if the prosecuting witness was paralyzed by fear or overcome by the superior strength of her attacker, has no application to the facts and circumstances revealed by the evidence in this case.

In the instant case, the prosecuting witness testified that she tried to fight but she did not describe anything that she did. She failed to make any struggle or outcry, nor was she bruised or struck. There was no showing of such resistance as demonstrates that the act was against her will.

Lord Hale once aptly said that an accusation of rape is easily made, hard to be proved, and still harder to be defended by one ever so innocent. (*People* v. *Freeman*, 244 Ill. 590.) It is for this reason that reviewing courts are especially charged with the duty to carefully examine the evidence in rape cases. (*People* v. *Kazmierczyk*, 357 Ill. 592.) It is further the duty of a reviewing court, where a verdict is returned by a jury in a criminal case or where a similar finding is made by a trial court where a jury has been waived, not only to consider the evidence but to reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the guilt of the defendant and is not sufficient to create an abiding conviction that he is guilty of the crime charged. (*People* v. *Scott*, 407 Ill. 301.)

The essential elements of the crime of forcible rape may not be presumed but it is incumbent upon the People to prove them beyond a reasonable doubt. Inasmuch as resistance was not proved beyond a reasonable doubt, petitioner was not proved guilty of the crime of forcible rape beyond a reasonable doubt. (*People* v. *Serrielle*, 354 Ill. 182.) The trial court should have allowed the motion for a directed verdict as to the first count of the indictment, at the close of the People's case. For the failure of the People to prove, beyond a reasonable doubt, the essential element of resistance, the court below should have reversed the judgment of conviction.

7. There was no evidence to show the age of petitioner.

Where a conviction of statutory rape is sought, to establish the corpus delicti, it is necessary that the evidence show, first, that the female was under the age of 16 years, second, that the male was over the age of 17 years, and third, that sexual intercourse occurred between them.

It is elementary that the corpus delicti cannot be proved by the statement or confession of the defendant alone. (*Wistrand* v. *People*, 213 Ill. 72, *Gore* v. *People*, 162 Ill. 259, *Williams* v. *People*, 101 Ill. 382, *May* v. *People*, 92 Ill. 343.) Unless petitioner was above the age of 17 years at the time of the alleged commission of the crime, there was no violation of the statute. It was as essential to prove his age as it was to establish the age of the female, or to show that sexual intercourse occurred. Either of the three elements lacking, the corpus delicti is not established. Consequently, there must be evidence tending to establish each of these three elements aside from the statement of petitioner. So far as his age was concerned, there was no evidence of it except in his purported statement which contained a recital that he was 28 years old. His age was not otherwise proven except that an officer testified that he appeared to be 28. There was, however, no foundation laid for his opinion. It follows, therefore, that a crime had not been committed because if he was not above the age of 17 years, no crime was committed.

Petitioner was on the witness stand at the preliminary hearing as to the admissibility of the statement, but the jury was excluded from the court room while he testified. But whether he did or did not testify, the law does not allow the jury to fix his age by inspecting his person. (*Stephenson* v. *State*, 28 Ind. 272.) While his appearance might be conclusive evidence to the jury, there would be difficulty in having evidence of that character preserved in the bill of exceptions or report of proceedings for the inspection of a reviewing court. To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust. (*Scaverns* v. *Lischinski*, 181 Ill. 356.)

In *Wistrand* v. *People*, 213 Ill. 72, the age of the defendant was material, and it was held that the jury could not determine his age by inspecting his person during the trial, but it was said that for the purpose of fixing his age, "persons who had seen him would have been competent to testify relative to his appearance, and such testimony would have been proper for the consideration of the jury on the question of age." This is not a holding that a witness may, in the first instance, express his opinion as to age from such appearance. Where testimony of this kind is material the witness should first describe the appearance of the individual whose age is in question, and then state his opinion relative to the age of the person, based upon the appearance of that person as he had already described it. (*People* v. *Davidson*, 240 Ill. 191.) The People, however, failed to pursue the proper method to obtain the opinion of the witness.

The age of petitioner which was an essential element of the corpus delicti was not proved. (*People* v. *Rogers*, 415 Ill. 343, *People* v. *Wilson*, 401 Ill. 68, *People* v. *Davidson*, 240 Ill. 191.) Inasmuch as his age was not proved beyond a reasonable doubt, petitioner was not proved guilty of the crime of statutory rape beyond a reasonable doubt. The trial court should have allowed the motion for a directed verdict as to the second count of the indictment, at the close of the People's case. For the failure of the People to prove, beyond a reasonable doubt, the age of petitioner, the court below should have reversed the judgment of conviction.

8. There was no evidence of the identity of petitioner.

Mrs. Templeman testified that the person seemed quite tall, in the neighborhood of 6 feet, but she couldn't say his exact height. She could see his height but not his

face because she wasn't close enough to him. She didn't know how old the person was or how he was dressed. The only time she had seen petitioner at her home that she could identify him was on October 14, 1955.

The prosecuting witness testified that she heard the voice of petitioner on October 14, 1955, that it was the same voice, then that it sounded like the same voice, and lastly, that it was the same voice that she heard on September 18, 1955. She also testified that the height and profile were similar. On cross examination she testified that she didn't know who it was in the bedroom because she couldn't see him.

Darla Templeman, a sister, testified that she saw the man when her sister held a flashlight in his face and that petitioner was the same man, but her sister failed to so testify. She didn't hear the voice of the man that was there that night, she just saw him. She wasn't awake when the person walked into the bedroom. It was when she was awakened, she claimed, by conversation, that she saw a person sitting on the bed. She didn't tell petitioner, however, while he was in the house with the deputy sheriffs, that she had seen him before. As heretofore shown, she was not competent to testify.

This was in substance the only testimony relative to the identity of petitioner. It was not positive or definite. It leaves a reasonable doubt that petitioner was the person who committed the crime charged in the indictment. It was not sufficient to sustain the judgment of conviction. Not only was the verdict against the manifest weight of the evidence, but the evidence was so doubtful, improbable and unsatisfactory as to raise a reasonable doubt of the guilt of petitioner. The court below should have reversed the judgment of conviction.

9. The testimony of the prosecuting witness was not clear and convincing.

In a rape case, where the charge is denied, in order to sustain a conviction, unless the evidence is clear and convincing, the testimony of the prosecuting witness must be corroborated by other facts and circumstances in evidence. (*People* v. *Williams*, 414 Ill. 414, *People* v. *Silva*, 405 Ill. 158.) Where the injured female testified to the commission of the rape, evidence of complaint by her soon after the occurrence, or at the first opportunity, is competent, not to prove the commission of the act, but to corroborate her testimony. (*People* v. *Carruthers*, 379 Ill. 388.)

In the instant case, the prosecuting witness did not testify that she made complaint to anyone. Her mother, however, was asked to relate what her daughter told her on September 18, 1955. Objection was made by petitioner, but the trial court permitted her to testify. As heretofore shown, this was hearsay evidence. It was incompetent. Darla, a sister, claimed to identify petitioner but, as heretofore shown, she was not competent to testify. There was absolutely nothing to corroborate the testimony of the prosecuting witness.

The failure of the prosecuting witness to attempt to escape, to make any struggle or outcry, or to identify petitioner, is inconceivable. There is no suggestion in the evidence that the act was accompanied by force. Her testimony was not of that clear and convincing character that is required to support the judgment of conviction. Justice demands that petitioner be given a new trial.

The case against petitioner was so inconclusive that it was the duty of the court below to reverse the judgment of conviction. It simply cannot stand.

10. In his argument the State's Attorney made improper remarks to the jury.

It is the duty of the State's Attorney to see that every accused person has a fair and impartial trial. He is required to treat the defendant fairly in his argument as well as to produce only competent evidence during the trial. (*People* v. *Black*, 317 Ill. 603.)

The scope and extent of the arguments are subject to the control of the trial court in the exercise of a sound discretion, which, particularly in cases involving the rights and liberty of an accused must be carefully and cautiously exercised.

It is error for the State's Attorney to make remarks outside the record which are injurious to the accused, in that they prejudice the minds of the jury against him. He must not make remarks which appeal to, and tend to inflame or excite the minds of the jury against the accused.

The remarks of the State's Attorney which consist of personal abuse or vilification of the accused, and which tend to arouse or inflame the passion and prejudice of the jury against him, are error, where they are not based upon any facts in evidence. (*O'Donnell* v. *People*, 110 Ill. App. 250, aff. 211 Ill. 158, *Earll* v. *People*, 99 Ill. 123.)

In the instant case, the State's Attorney used language tending to inflame and excite the minds of the jury against the petitioner. He also used language tending to coerce the jury into a verdict of guilty.

In a case like this, where there is reason to fear that the verdict was not the result of fair, impartial and dispassionate consideration of all the evidence, such argument becomes material and substantial error. There is

no instrument that can be used to measure and determine the effect of inflammatory remarks upon the minds of the jury. If the effect could be measured and determined, there is no eraser available to the trial court to erase it. *People* v. *Maria*, 359 Ill. 231.) The court below has severly condemned inflammatory and intemperate remarks of State's Attorneys who have overstepped the bounds of fact and propriety in their closing arguments to the jury. (*People* v. *Weitzman*, 362 Ill. 11.)

It is clear that the jury was influenced by the improper remarks of the State's Attorney. They were highly prejudicial to petitioner. The objections to the argument should have been sustained. The State's Attorney should have been promptly rebuked and such measures taken by the trial court as would effectually prevent any repetition of such conduct. The prejudicial and inflammatory argument of the State's Attorney required that the court below reverse the judgment of conviction.

The right to a fair trial is the greatest human right that an accused has. Petitioner was denied a fair trial by an impartial jury. This constituted a denial of due process of law.

11. Erroneous instructions tendered by the People were given to the jury.

Instruction No. 6 relative to the falso in uno rule should not have been given.

The record fails to disclose any instruction which apprises the jury of what are, or are not, the material facts, or defines the essential elements of the crimes with which petitioner was charged. The instruction which quoted part of the statute was not a sufficient definition of the essential elements. There was no instruction which advised the jury as to what constituted statutory rape.

This form of instruction has been repeatedly condemned by the court below. It was reversible error to give the instruction. (*People* v. *DeMarios*, 401 Ill. 146, *People* v. *Scott*, 401 Ill. 80, *People* v. *Arcabascio*, 395 Ill. 487, *People* v. *Wells*, 380 Ill. 347, *People* v. *Flynn*, 378 Ill. 351.)

The instruction was indeed pernicious. The court below should have reversed the judgment of conviction because of the instruction alone. It cannot be ignored by this court.

Instruction No. 19 relative to circumstantial evidence should not have been given.

It was not applicable to the case.

Although all the evidence in the case tending to show the guilt of the defendant was direct evidence, the trial court gave the instruction relative to circumstantial evidence. The giving of the instruction was tantamount to telling the jury that there was circumstantial evidence in the case sufficient to warrant a conviction. (*People* v. *Braidman*, 323 Ill., 37.) Considering the state of the evidence, the error in giving the instruction is of too grave a character to be able to say that petitioner was not prejudiced by it. (*People* v. *Ambach*, 247 Ill. 451.)

It was reversible error to give the instruction. (*Kevern* v. *People*, 224 Ill. 170, *Cunningham* v. *People*, 210 Ill. 410.)

Instruction No. 28 relative to the defense of alibi should not have been given.

It was not applicable to the case.

In *People* v. *Braidman*, 323 Ill. 37, it was said that the giving of a similar instruction, under the state of the proof, might well be taken by the jury as an intimation by the court that there was some question as to the sufficiency of the alibi, other than the question of credibility of the witnesses.

In *People* v. *Reno*, 324 Ill. 484, the defendant was the only one to testify to an alibi and a similar instruction was the only one given on the question of alibi. The case was distinguished from *People* v. *Schladweiler*, 315 Ill. 553, which held that the instruction was an abstract proposition of law which was not applicable to the facts.

In *People* v. *Frugoli*, 334 Ill. 324, the instruction was deemed correct as an abstract proposition of law, but it was not applicable to the case and under the evidence was held to be reversible error.

The instruction was condemned in *People* v. *Lacey*, 339 Ill. 480, because the testimony of the alibi witnesses covered the entire time. The *Braidman*, *Reno* and *Frugoli* cases were followed.

The instruction was held to be properly given in *People* v. *Terracco*, 346 Ill. 423, but the court cited *People* v. *Lacey* with approval, and said "Whether this instruction is correct or erroneous depends upon the facts in the particular case."

While the instruction has been held in several cases including *People* v. *Schladweiler*, to be proper where the evidence warrants it, yet where, as in the instant case, the evidence of the alibi witnesses covered the entire time, it was reversible error to give it.

12. The trial court erred in entering judgment of conviction on the verdict of the jury and in imposing sentence.

The indictment consisted of three counts. The first count alleged forcible rape. The second count alleged statutory rape. The third count alleged assault with the intent to commit rape.

The jury found the defendant guilty of rape in manner and form as charged in the first and second counts of the indictment and fixed his punishment at imprisonment in the penitentiary for a term of 15 years. No verdict, however, was returned as to the third count.

In forcible rape, the act must be shown to have been committed by force and against the will of the female. In statutory rape, it is immaterial whether it was with her consent or against her will. (*People* v. *Sassano*, 323 Ill. 182.) The verdict was inconsistent.

The failure to return a verdict as to the third count is equivalent to a finding of not guilty. The verdict of guilty as to the first and second counts is inconsistent with the implied acquital as to the third count. There can be no rape without an assault with intent to commit rape.

Where an indictment charges separate and distinct offenses in separate counts, the jury should pass upon each count separately applying to it the evidence bearing on the guilt of the defendant of the crime charged. The jury should have returned a separate verdict as to each count of the indictment but it failed to do so.

The jury fixed the punishment under two counts of the indictment. It should have been fixed under each count in separate verdicts.

The verdict is so defective that judgment of conviction could not be legally entered thereon.

Petitioner was sentenced to the pententiary but the trial court failed to fix a definite term of imprisonment. The sentence is uncertain and indefinite.

The judgment of conviction and sentence is void.

Conclusion.

This case involves a substantial federal question. Important principles of constitutional law were overlooked or misapprehended by the courts below. Petitioner was denied a fair and impartial trial. Illinois has deprived him of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. There has been a most flagrant and unwarranted violation of his Constitutional rights. This court should take jurisdiction in order that justice may be done. It is the last hope of an innocent man.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,

Counsel for Petitioner.

APPENDIX.

A.

Statute.

An Act to review the law in relation to change of venue.

Section 18. When any defendant in an indictment or information in any court in this state shall fear that he will not receive a fair and impartial trial in the court in which the case is pending, because the judge of the court is, or the inhabitants of the county in which the case is pending are prejudiced against him, or the attorney representing him, the court shall award a change of venue upon the application of the defendant as hereinafter provided.

Section 20. Every application for a change of venue shall be by petition setting forth the cause for the application and praying a change of venue, which petition shall be verified by the affidavit of the defendant.

Section 21. When the cause for a change of venue is the prejudice of the judge or any two of them against the defendant or his attorney, the petition shall be accompanied by the affidavit of the defendant or his attorney, stating that he believes the judge, or any two of them, as the case may be, are so prejudiced against the applicant or his attorney, that either cannot have a fair and impartial trial, and thereupon the case may be tried by any other of the circuit judges of the circuit in which the case is pending, and the venue shall not be changed from the county in which the indictment is found or the information is filed, in such case.

(Appendix)

Section 23. The application may be made to the court in which the case is pending, or to the judge thereof in vacation, reasonable notice of the application having been given to the State's Attorney.

Section 24. No application for a change of venue made more than thirty days after the earliest day at which the applicant might have been heard shall be allowed unless the applicant shall have given to the State's Attorney at least ten days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application.

Section 25. No change of venue shall be granted more than thirty days after the earliest day at which the applicant might have been heard unless he shall show that the causes for which a change of venue is asked have arisen or come to his knowledge since the expiration of such thirty days.

Approved March 25, 1874.

Ill. Rev. Stat. 1955, Chap. 146.

B.

Opinion.

Mr. Justice Davis delivered the opinion of the court:

James Dayis, defendant, was indicted in the circuit court of Winnebago County for the crimes of forcible rape, statutory rape, and assault with intent to commit rape, alleged to have been committed on September 18, 1955, upon a 14-year-old girl. He entered a plea of not guilty; the case was tried before a jury which found him guilty of forcible rape, in the manner and form as charged in count I, and guilty of statutory rape, as charged in count II of the indictment, and fixed his punishment at imprisonment in the penitentiary for 15 years. No verdict was returned as to the third count of the indictment which charged assault with intent to commit rape. Post-trial motions were overruled, and the defendant was sentenced on the jury's verdict. He now brings this writ of error to review the judgment of conviction and sentence.

The defendant assigned the following errors for reversal of the judgment: (1) denial of application for change of venue; (2) the admission of evidence; (3) the evidence failed to prove the guilt of defendant beyond a reasonable doubt; (4) improper argument by State's Attorney; (5) the giving and refusing of certain instructions; and (6) error in entering judgment of conviction on the verdict of the jury and in imposing sentence.

Defendant first contends that the court erred in denying his application for change of venue. He was indicted by the grand jury and *capias* issued for his arrest on January 9, 1956. On January 11, 1956, the defendant appeared in court with his attorney, and after being arraigned,

made a motion to quash the indictment which motion was heard and denied. Defendant then entered a plea of not guilty to the indictment and the court set the case for trial on February 13, 1956, but it was not reached. On the following day, the defendant filed a petition for change of venue from Judges O'Sullivan and Dusher, on the ground of prejudice. The verified petition, not accompanied by supporting affidavit, averred that "such cause for a change of venue arose and came to his knowledge heretofore and again on February 13, 1956."

The Venue Act, (Ill. Rev. Stat. 1955, chap. 146,) contains the requirements and provides the procedure to be followed in connection with a change of venue. The specific provisions of certain sections of this act are subsequently outlined. Section 18 provides that when any defendant in an indictment or information fears that he will not receive a fair and impartial trial in the court in which the case is pending because the judge is, or the inhabitants of the county are, prejudiced against him, the court shall award a change of venue upon the application of the defendant, provided the application is in conformity with subsequent sections of the act. Section 20 provides that every such application shall be by petition setting forth the cause of the application and praying a change of venue, and that the petition shall be verified by the affidavit of the defendant. Section 21 provides that when the cause for change of venue is the prejudice of the judge against the defendant or his attorney, the petition shall be accompanied by the affidavit of the defendant or his attorney, stating that he believes the judge is so prejudiced against the applicant or his attorney that either cannot have a fair and impartial trial. Section 24 provides that no application for change of venue made more than 30 days after the earliest day at which the applicant might have been heard

shall be allowed unless the applicant shall have given to the State's Attorney at east 10 days' previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than 10 days before making the application. Section 25 provides that no change of venue shall be granted more than 30 days after the earliest day at which the applicant might have been heard unless he shall show that the causes for which a change is asked have arisen or come to his knowledge since the expiration of such 30 days.

In a criminal case, if the petition for change of venue on account of the prejudice of the judge, and the accompanying affidavit, are in compliance with the act, the right of the defendant to a change of venue is absolute. Under such circumstances the trial judge loses all power and authority over the case except to make the necessary order to effectuate the change; and the denial of the petition constitutes reversible error. *People* v. *Rosenbaum*, 299 Ill. 93; *People* v. *Cohen*, 268 Ill. 416; *Cantwell* v. *People*, 138 Ill. 602.

The petition was not accompanied by an affidavit of defendant or his attorney, and we question whether it was filed in apt time. However, we need not determine whether it met with the technical requirements of the statute. In colloquy relative to change of venue, between the trial court, the attorney for defendant, and the State's Attorney, and in the presence of the defendant, the attorney for the defendant stated: "I understand your Honor is going to be here next month; Judge Dusher is not going to be here. I would say this, if the Court would remove this case from the trial list at the present time and not pass on the petition, it could be set for trial before you next month. I understand there is to be a jury". In view of this statement we conclude that the allegation of prejudice was without

foundation; that the petition was filed for the purpose of delay; that the alleged prejudice of the trial judge was waived; and that the trial court properly denied the petition for change of venue.

Defendant next contends that the trial court erred in the admission of evidence. He first urges that the comments of the complaining witness made immediately after the alleged offense were not admissible. The mother of the complaining witness testified on direct examination that she was awakened by her 9-year old daughter about 2:30 or 3:00 o'clock on the morning of September 18, 1955; that she went into the kitchen, turned on the light, and saw a man standing beside complaining witness's bed in the adjoining bedroom; that she could see his height but not his face because there was no light in the bedroom and she wasn't close enough to him; that he was in the neighborhood of six feet tall; that he told her to get back in her room if she knew what was good for her; that she went back to her bedroom to awaken her husband and then heard the person leave the house by the kitchen door. She further testified that, after telephoning for the sheriff, she talked to her 14-year-old daughter, the complaining witness; that said daughter was hysterical and there wasn't much she could get out of her; and that the complaining witness said, "Mother, he threatened to kill me." The mother also testified that the complaining witness told her that defendant also threatened to kill Billy; that he said he would cut her guts out if she didn't lay down and shut up; that he said if she didn't do what he wanted to do he would kill her; and that complaining witness said, "Mother, he did it to me."

In rape cases, where the injured female is a witness, it is proper for her to testify that she made prompt complaint concerning the outrage which had been perpetrated

upon her, and it is proper to permit the person to whom she complained to give testimony that the complaint was made, but it is not proper for such person to give the name of the accused or the details of the offense. We believe that the testimony of the mother was within the limitations prescribed by law. The details of the offense were not related by her. The declarations preceding the words, "Mother, he did it to me" were merely introductory. Evidence of such complaint is admitted on the theory that the natural instinct of a female thus outraged prompts her to express her indignation at the injury inflicted upon her, and it is deemed relevant on the ground that it corroborates her statement that she was assaulted. (*People* v. *Romano,* 306 Ill. 502; *Stevens* v. *People,* 158 Ill. 111.) To be admissible the complaint of the offense must be made, as it was in this case, without inconsistent or unexplained delay and must be spontaneous declaration of injury, and not the mere recital of past events made in answer to questions. (*Cunningham* v. *People,* 210 Ill. 410.) The admission of such complaint is an exception to the general rule that hearsay evidence is not admissible and does not extend to crimes other than rape. *People* v. *Romano,* 306 Ill. 502; *Stevens* v. *People,* 158 Ill. 111.

Defendant also urges that the sister of the complaining witness, an eyewitness to the event, should not have been permitted to testify in that preliminary inquiry was not sufficient to establish her competency. At the time of the offense, the sister was 9 years old; at the time of trial she was 10 years old and in the fourth grade. We are unable to agree that it was error to permit her to testify. She was subjected to an examination by the court to determine her competency; the court found that the child had sufficient mental perception and moral understanding to qualify her to speak as a witness. If the witness was sufficiently

nature to receive correct impressions by her senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth, she was competent. Not age, but the degree of intelligence of a child, determines the question of the child's competency. (*Shannon* v. *Swanson*, 208 Ill. 52; *State* v. *Segerberg*, 131 Conn. 546, 41 A.2d 101.) In the case at bar the intelligence of the witness was ascertained, to some extent, by her appearance and conduct in the presence of the court, and it is only where there has been an abuse of discretion or a manifest misapprehension of some legal principle that a decision to admit such testimony will be reviewed. (*People* v. *Karpovich*, 288 Ill. 268.) We find no reason to disturb the court's determination that the witness was competent.

At the trial a statement in writing in narrative form, signed by the defendant, was offered in evidence as People's exhibit No. 1. The defendant objected to its introduction on the ground that the statement was not voluntary. A preliminary hearing on this issue was had before the court out of the presence of the jury. Joe Ferona, a witness for the People, testified that on October 14, 1955, approximately an hour-and-a-half after being taken into custody, the defendant was questioned by the witness and another deputy sheriff at the sheriff's office; that approximately one-half hour thereafter the witness typed People's exhibit No. 1 from statements made to him by defendant; and that the defendant immediately read and signed it. In substance, the statement sets forth that the defendant was 28 years of age; that on the morning of September 18 he entered the complaining witness's home in Rockford at about 4:00 A.M.; that a young girl let him in; that he told her to go to bed; that he got on top of her but had nothing to do with her sexually; that he left by the rear

door of the house; and that no threats or promises were made to defendant and no acts of violence done him in connection with the giving of the statement.

On cross-examination Ferona testified that he and deputy sheriff Mike Iasparro, picked up defendant at about 6:45 P.M. at the house of defendant's sister; that they drove him first to the complaining witness's home, then to the Atwood factory to be viewed by a prospective witness, and then to the sheriff's office; that about 8:15 P.M. or twenty minutes after the three arrived at the sheriff's office, the defendant made the statement, and that the defendant, deputy sheriff Mike Iasparro, and Robert L. McDonald, an assistant State's Attorney, were present.

Mike Iasparro was called as a witness on behalf of the People. His testimony on direct examination corroborated that of witness Ferona. On cross-examination he testified that defendant was told he could have a lawyer, and that defendant didn't appear to be too nervous.

Defendant, on direct examination, testified that he was at his sister's home eating supper when the officers arrived on October 14; that he was taken by the deputies to the complaining witness's home and the Atwood factory, and was questioned by the officers during this time; that after they reached the court house the two officers questioned him for at least half an hour; that he was nervous and scared; that the officers promised that if he would sign a statement, he could go home to his wife and eat supper; and that he had eighth grade education and was unable to read or write. While a witness he was presented with the statement in question and asked to read it, and the record indicates that he read the introductory portion of the statement well. It also appears that after reading approximately one third of the body of the statement he

apparently remembered that he had testified that he was unable to read. Thereafter, he read in a halting, stumbling and confused manner. It is our conclusion that the defendant could read the statement. In response to a question regarding a request for a lawyer he said he did ask for one but that the two deputy sheriffs told him the lawyers were "all out of town."

Confessions are competent evidence only when they are voluntarily made. (*People* v. *Wagoner*, 8 Ill. 2d 188; *People* v. *Sweeney*, 304 Ill. 502.) A confession need not be spontaneous, nor is it necessary that it proceed wholly at the suggestion of the accused. It may be set in motion by external causes so long as such influences are not what the law deems improper. A confession is not rendered inadmissible by the mere fact that it was elicited by questions put by police officers or others, or by the fact that an exhortation to tell the truth produced it, (*People* v. *Vinci*, 295 Ill. 419,) nor does the fact that the prisoner was not warned that the confession might be used against him render it incompetent. *People* v. *Fox*, 319 Ill. 606; *Wilson* v. *United States*, 162 U.S. 613.

Defendant contends that the statement in question should have been supported by the testimony of all persons present who heard or participated in the questioning. Where there is evidence of improper conduct in obtaining an alleged confession, the People are required, if feasible, to produce all persons having any authority or control over the defendant, and to show all circumstances surrounding the taking of the confession; and the court may exclude such confession unless all parties present in connection with its taking are called as witnesses. (*People* v. *Waggoner*, 8 Ill. 2d 188; *People* v. *Ickes*, 370 Ill. 486.) However, in the case at bar, we find no evidence of improper conduct in obtaining the alleged confession. It was signed within

two hours after the defendant was taken into custody. There was no long or unreasonable interrogation. There is no claim of violence, threats of harm, duress, coercion, or abuse, or that there was an offer or promise of leniency. We cannot regard the promise, that defendant might go home to his wife and eat supper if he signed the confession, to be such as would exercise influence over his mind and induce him to confess to a criminal offense which he did not commit. We find no evidence of improper conduct in obtaining the confession and believe that the People established this by the testimony of the deputy sheriffs. However, as stated in *People* v. *Fox*, 319 Ill. 606, 617, "The order of proof is largely within the discretion of the trial judge. While the burden of showing that no improper inducement existed when the confession was made is upon the prosecution, it is not necessary for the prosecution to produce all its evidence before any evidence is produced on behalf of the accused. After the State has made a *prima facie* case, then the burden of going forward with the proof properly shifts to the accused. [Citation.] After the accused has made his case, the prosecution may produce evidence in rebuttal to meet that offered against the competency of the confession. In order to meet its burden of showing the confession to be voluntary, the prosecution must show by its witnesses the circumstances under which the confession was made, with sufficient detail to enable the court to determine the question." Since the defendant offered no evidence of improper conduct in obtaining the alleged confession, the trial court did not err in admitting it in evidence without the testimony of the Assistant State's Attorney, who was likewise present when it was taken.

The defendant contends that the testimony of Erwin Le Roy Pollett, introduced in rebuttal, was too remote and

therefore not admissible. Defendant took the stand in his own defense and testified, in support of his alibi, that prior to October 14, 1955, he had never, at any time, gone to the home of the complaining witness, nor been on the street where she lived. The testimony of Pollet was introduced to establish that he had seen the defendant peering into the window of complaining witness's home one week after the crime was committed. It was given to rebut the direct evidence given by the defendant, and was clearly admissible for that purpose.

The defendant further contends the evidence failed to prove his guilt beyond a reasonable doubt, and that there was no evidence to show force or resistance. This contention cannot stand in the light of the facts in this case. The complaining witness was a 14-year-old girl peacefully sleeping in her home with her brothers and sisters. The defendant entered her home in the night time. He had no acquaintanceship with this family, and could have had no lawful purpose in entering the home. The record shows that he went into the bedroom and forcibly had sexual intercourse with the girl against her will; that he threatened he would cut her guts out if she didn't lay down and shut up, and said that if she didn't do what he wanted to he would kill her; and that he forcibly pulled off her pajama bottoms. The complaining witness testified that she tried to fight, but he threatened her with some object in his hand and threatened to kill both her and her brother, and that she was scared. After considering all the facts and circumstances in evidence, the jury determined, and we believe properly, that the acts were against her will. (*People* v. *Fearing*, 365 Ill. 62; *Austine* v. *People*, 110 Ill. 248,) and that the defendant was guilty beyond a reasonable doubt of forcible and statutory rape.

(Opinion)

The defendant urges that his age was not proved. To establish the *corpus delecti* in statutory rape, it is necessary that the proof should show that the female was under the age of 16; that the male was over the age of 17; and that sexual intercourse occurred between them. To establish the *corpus delecti* in forcible rape, it is necessary that the proof show that a male person of the age of 14 years and upwards had carnal knowledge of a female forcibly and against her will. The defendant, in his signed statement admitted into evidence as People's exhibit No. 1, stated that he was 28 years of age, married, and that he was living with his wife. Later he testified that he was 28 years of age and had been employed in a local factory for eight years. Without objection on the part of defendant, the deputy sheriff, Mike Iasparro, testified that the defendant had said he was 28 years old; and that he appeared to be that age. In the absence of specific objection, it was proper to permit this witness to give his opinion as to defendant's age. (*People* v. *Claussen,* 367 Ill. 430.) Anna Catherine Davis, mother of defendant, was called as a witness in his behalf, and she testified on direct examination that he was 28 years of age. The record clearly shows that the defendant was over the required age.

The defendant also contends that there was no evidence which identified him as the person who committed the crimes charged in the indictment. The testimony of one credible witness, if positive, is sufficient to convict even though contradicted by the accused. Where it is corroborated by other evidence, it is clearly adequate to justify a conviction. (*People* v. *Sproch,* 409 Ill. 55; *People* v. *Thompson,* 406 Ill. 555.) In the present case, the defendant in his statement admitted being in the complaining witness's home at the time of the assault. He was positively identified by one witness who saw the offense committed.

Two other witnesses identified the defendant by height, profile and voice. We find no merit in this contention.

The defendant also argues that the testimony of the prosecuting witness was not clear and convincing, and that unless such testimony is clear and convincing, it must be corroborated by other facts and circumstances in order to sustain a conviction. (*People* v. *Silva*, 405 Ill. 158; *People* v. *Williams*, 414 Ill. 414.) However, in the instant case the testimony of the prosecuting witness was clear and convincing, and, in addition, she was corroborated by the testimony of her sister as to the events leading up to and at the time of the offense. The testimony of her mother, and the admissions contained in the statement of defendant were likewise corroborative of her testimony. Dr. Roberts, the examining physician, testified that he found her hymen torn in two places and bleeding; that he found sperm cells from the testes of a male within her vagina; that no old or other tears were found in the hymen; and that it was his belief that this was the first time her vagina had been entered. These circumstances are mute, corroborative evidence to support her testimony. Standing against this positive evidence is the defense of an alibi. On such a record we will not substitute our judgment for that of the jury that heard and saw the witnesses, unless it can be said that it is palpably contrary to the weight of the evidence, or is so unsatisfactory as to justify a reasonable doubt of defendant's guilt. (*People* v. *Ortega*, 5 Ill. 2d 79; *People* v. *Harris*, 391 Ill. 358; *People* v. *Canonica*, 370 Ill. 441.) The mere fact that the evidence is conflicting will not justify reversal. *People* v. *Meyers*, 412 Ill. 136; *People* v. *Hinderhan*, 405 Ill. 435.

As a further ground for reversal, the defendant contends that the trial court committed error in giving and

refusing to give certain instructions. The People tendered 34 instructions of which 32 were given, while defendant tendered 27, of which 22 were given. We have considered them, but find no prejudicial error. However, error in the giving or refusing of instructions will not, alone, justify a reversal when the evidence of the defendant's guilt is so clear and convincing, as it was in the case at bar, that a jury could not reasonably have found the defendant not guilty. (*People* v. *McCurrie*, 337 Ill. 290.) After considering the 61 instructions tendered in this case, we cannot but quote the pertinent observations which we made in *People* v. *Burns*, 300 Ill. 361, at page 365: "Counsel have little room to complain of error in instructions where they burden the trial court with the labor of weeding out a lot of miscellaneous stock instructions in the short time available for this task of the court."

The defendant has also charged that the court erred in permitting improper argument by the State's Attorney. No specific objection, however, is assigned. We have considered the general propositions cited by the defendant and have read the argument as presented in the record, but we find no reversible error in this respect.

The defendant has also argued that the court erred in entering judgment of conviction on the verdict of the jury and in imposing sentence. The indictment consisted of three counts, as heretofore outlined. The jury found the defendant guilty of both statutory and forcible rape. The evidence supports these verdicts. The defendant urges that the verdict is inconsistent. We cannot agree. In forcible rape the act must be shown to have been against the will of the female. In statutory rape, it is immaterial whether it is with her consent or against her will. In the case at bar the jury was warranted from the evidence in finding the act against the will of the complaining witness under

the charges of both forcible and statutory rape. Moreover, a conviction of rape is a conviction of assault to commit rape. (*People* v. *Ristau*, 363 Ill. 583.) Failure to return a verdict as to the charge of assault with intent to commit rape does not constitute reversible error. The lesser offense is included in the greater. The jury sets the penalty in rape cases. There was one rape involved and the jury set only one penalty even though the act constituted both forcible and statutory rape. The verdict was proper and the judgment entered thereon is valid.

"It is not the purpose of a court of review to determine whether or not a record is free from error, but rather to determine whether or not the accused has had a fair trial under the law and whether his conviction is based upon evidence establishing his guilt beyond a reasonable doubt." *People* v. *Stavrakas*, 355 Ill. 570, 583.

We conclude from the record that the defendant had a fair trial; that the errors assigned could not reasonably have affected the result of the trial; and that the judgment of the trial court should be affirmed.

The judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.